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Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence

Phyllis Goldfarb*

In this Article, Professor Goldfarb examines the construction of gender roles in the discourse on intimate violence. The Article argues that this discourse assumes that male violence against female intimates represents the problem of battering in its entirety. In doing so, the discourse renders invisible the battering that occurs outside this discourse, most notably battering within same-sex relationships. The Article focuses on how the gender assumptions in the domestic violence discourse affected the representation of the Framingham Eight, a group of women who killed their batterers and were incarcerated in the women's prison in Framingham, Massachusetts. These women petitioned as a group for the commutation of their sentences. Seven of the women had killed their male partners; one had killed her female partner. Professor Goldfarb discusses why the lesbian petitioner faced the longest odds in her struggle to be seen and heard. First, the Article describes the phenomenon of intimate violence in same-sex relationships. Next, the Article explores how and why the contemporary discourse of intimate violence is gender-specific. After identifying a need for the expansion of the conversation on intimate violence, the Article suggests enumerating parallel discourses that are tied to their particular and varied contexts. Last, the Article discusses the professional responsibility issues implicated when an attorney represents a client who conforms to gender stereotypes that inflict harm on others.

Introduction

Not long ago, the victims' rights movement crossed paths with a public education movement sparked by feminist activists concerned about women who suffer violence. The combined strength of these otherwise politically disparate forces created a cultural opening for women who had suffered violence at the hands of their intimate partners to begin to relinquish their shame and speak of their torment. Their stories spilled out one by one by one, forming a powerful current. The pressure generated by this current

* Associate Professor of Law, Boston College Law School. In writing this Article, I received assistance from Arthur Berney, Mary Bilder, Richard Boldt, Greg Conti, Anthony Farley, Jim Fellows, George Fisher, Ingrid Hillinger, Sandra Lundy, Ray Madoff, Judith McMorro, Martha Minow, Avi Soifer, Carol Weisbrod, Catherine Wells, and Roberta Vit. Thanks to you all. I was also fortunate to receive helpful feedback from the participants in the feminist theory working group of the World Congress of the International Association of the Philosophy of Law and Social Philosophy held in Bologna, Italy, in June 1995. I am indebted as well to Amanda Burling, Siobhan Mee, Jennifer Romer, Tracey Spruce, and Lisa Valensi for research assistance, to Barbara Koocher for administrative assistance, and to Dean Soifer for generous research support. Of course, many thanks are due to the dedicated group of students, alumni, and faculty—especially Judith McMorro—of the Boston College Law School Clemency Project, to the organizers of the Framingham Eight Commutation Project, and to the Framingham Eight themselves for permitting so many to learn so much from their suffering and their strength.

forced changes in a number of arenas, including social services,¹ medicine,² and law.

Law's response, though not swift, has been steadily growing.³ Civil orders of protection are now available to abused women in virtually every

¹ Domestic violence has burst onto the social services agenda. This is reflected in the proliferation of social science literature concerning domestic violence. Well-known recently published works include JULIE BLACKMAN, *INTIMATE VIOLENCE* (1989); EDWARD W. GONDOLF & ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* (1988); LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* (1989). For further discussion, see Cris M. Sullivan et al., *An Advocacy Intervention Program for Women with Abusive Partners: Initial Evaluation*, 20 AM. J. COMMUNITY PSYCHOL. 309 (1992); Cris M. Sullivan, *The Provision of Advocacy Services to Women Leaving Abusive Partners*, 6 J. INTERPERSONAL VIOLENCE 41 (1991).

In the past two decades, an awareness of the breadth and intensity of the problem of intimate violence has led to the development of battered women's shelters, lay advocates for abused women, networks of safe homes, and telephone hotlines. Treatment programs for men who batter are a more recent social services innovation. One such program, based in Boston, is known as EMERGE. Counselors at EMERGE have published descriptions and analyses of clinical work with batterers. These published works include David Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 176 (Kersti Yllö & Michele Bograd eds., 1988) [hereinafter FEMINIST PERSPECTIVES] and James Ptacek, *Why Do Men Batter Their Wives?*, *id.* at 133.

For the purposes of this article, it is worth noting that when these authors refer to batterers, they describe heterosexual men who batter heterosexual women. The authors do not allude to the possibility of gay male batterers or lesbian batterers.

² See Jean Abbott et al., *Domestic Violence Against Women: Incidence and Prevalence in an Emergency Department Population*, 273 JAMA 1763 (1995); American Psychiatric Ass'n, *Position Statement on Domestic Violence Against Women*, 151 AM. J. PSYCHIATRY 630 (1994); Mary Brendtro & Lee H. Bowker, *Battered Women: How Can Nurses Help?*, 10 ISSUES IN MENTAL HEALTH NURSING 169 (1989); Council on Ethical and Judicial Affairs, American Medical Ass'n, *Physicians and Domestic Violence: Ethical Considerations*, 267 JAMA 3190 (1992); Susan M. Hadley, *Working with Battered Women in the Emergency Department: A Model Program*, 18 J. EMERGENCY NURSING 18 (1992); Nancy S. Jecker, *Privacy Beliefs and the Violent Family: Extending the Ethical Argument for Physician Intervention*, 269 JAMA 776 (1993); Laura Kroll, *AMA Family Violence Campaign*, 269 JAMA 1875 (1993); Marti T. Loring & Roger W. Smith, *Health Care Barriers and Interventions for Battered Women*, U.S. DEP'T OF HEALTH & HUMAN SERVICES (May 1994), reprinted in 109(3) PUBLIC HEALTH REP. QJA 328-38 (May-June 1994); Special Edition, *Domestic Violence*, 267 JAMA 3113 (1992); Nancy K. Sugg & Thomas Inui, *Primary Care Physicians' Response to Domestic Violence: Opening Pandora's Box*, 267 JAMA 3157 (1992); Virginia P. Tilden, *Response of the Health Care Delivery System to Battered Women*, 10 ISSUES IN MENTAL HEALTH NURSING 309 (1989); *Doctors Are Advised to Screen Women for Abuse*, N.Y. TIMES, June 17, 1992, at A26 (reporting AMA advice to doctors to screen women patients for abuse as a routine matter due to prevalence of domestic violence).

³ Until recently, law's primary response to battering was to arrest and incarcerate perpetrators of domestic homicide. Both abusive men who killed their partners and women who killed abusive partners were considered murderers. Recent reevaluation of the cases of women who kill suggest that many may qualify as self-defense killings. See, e.g., Angela Browne & Kirk R. Williams, *Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 LAW & SOC'Y REV. 75, 76 (1989) (finding that women kill in response to male violence far more than men kill in response to female violence). Despite the possible self-defense motive in many cases of women who kill male intimates, these cases represent one-third of those resulting in death sentences for women. See Victor L. Streib, *Death Penalty for Battered Women*, 20 FLA. ST. U. L. REV. 163, 186 (1992). While disclaiming the role of her abuse in his decision, Jim Edgar, the tough-on-crime governor of Illinois, recently granted an eleventh-hour commutation to Guinevere Garcia, a battered woman scheduled to be executed for the murder

state.⁴ Federal legislation seeks to prevent family violence, protect women from abusers,⁵ and provide compensation to victims of domestic violence.⁶ There are programs of mandatory arrest for accused batterers in a number of locales.⁷ Tort remedies against batterers are becoming increasingly effective.⁸

of her husband. See Ted Gregory & Christi Parsons, *The Surprise Decision: Edgar's Power Halts Execution of Garcia*, CHI. TRIB., Jan. 17, 1996, at 1.

⁴ See KATHARINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 531-32 (1993); Gary R. Brown, *Battered Women and the Temporary Restraining Order*, 10 WOMEN'S RTS. L. REP. 261 (1988); Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43 (1989); Elizabeth Topcliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039 (1992).

⁵ See, e.g., Family Violence Prevention and Services Act of 1984, 42 U.S.C. § 10410 (1989). This act, among other things, authorized funds for shelters. In October 1994, Congress passed the Violence Against Women Act as part of the crime bill. See Violence Against Women Act, H.R. 3355, 103d Cong., 2d Sess. (1994) in Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. §§ 13931-14040 (1994)). The Act, which became effective on January 1, 1995, seeks to protect women from abuse by increasing the likelihood and severity of civil and criminal sanctions against abusers, and by providing education for officials and other citizens about the problem of violence against women.

⁶ See Victims of Crime Act of 1989, 42 U.S.C. §§ 10601, 10602(b)(7) (1989) ("VOCA"). The most common cultural label for violence between adult intimates is "domestic violence." The accuracy of this label is reduced by the trivializing effect of the first word, "domestic" (as in "domesticated") on the second word, "violence." This is a consequence of the cultural understanding of the home as a safe haven. See Elizabeth A. Stanko, *Fear of Crime and the Myth of the Safe Home: A Feminist Critique of Criminology*, in FEMINIST PERSPECTIVES, *supra* note 1, at 75. I prefer the term "intimate violence" to denote violence occurring in relationships between adult intimates. See BLACKMAN, *supra* note 1 (using the term somewhat more broadly). Denise Bricker also prefers the term "intimate violence" because it diminishes the link to violence between male batterers and female victims that "domestic violence" has come to connote. See Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Women's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379, 1382 n.15 (1993). I do, however, use the term "domestic violence" in this Article when I refer to authors or texts that employ the term, or to dominant understandings of the problem of violence between adult intimates.

⁷ See, e.g., CONN. GEN. STAT. ANN. § 46b-38b (West. Supp. 1992) (mandatory arrest if officer believes a family violence crime has been committed); see also TENN. CODE ANN. §§ 36-3-619, 40-7-103(7) (1995) (preferred response is arrest if officer has probable cause to believe that domestic violence has occurred or that more violence will occur). According to Katharine Bartlett, as of 1990, 13 states required police to arrest when there is probable cause to believe a domestic violence felony has occurred, and 18 states required police to arrest upon probable cause for violations of civil protective orders. BARTLETT, *supra* note 4, at 531. For more specific information about these statutes, see Joan Pennington, *Family Law Developments*, 24 CLEARINGHOUSE REV. 925, 927 (1991).

Whether these statutes are effective in reducing future incidents of intimate violence is a matter of some controversy. A widely publicized study of the Minneapolis Police Department reported in 1984 suggested that mandatory arrest programs were effective in lowering the prevalence of repeat incidents of intimate violence. See Sarah M. Buel, Recent Development, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 215 (1988). Attempts to replicate the Minneapolis results in other cities have produced mixed results. Some researchers suggest that arrest decreases recidivism for employed and otherwise "socially bonded" batterers, but increases it among batterers who are unemployed or have limited social connections. See, e.g., Franklyn W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183 (1990); Antony M. Pate & Edwin E. Hamilton, *Formal and Informal Deterrents to Domestic Violence: The Dade County Spouse Assault Experiment*, 57 AM.

Litigation alleging civil rights violations for the failure of police officers to respond to domestic violence complaints has led to improved police action on domestic violence calls.⁹ Commentators have characterized battering as a violation of human rights,¹⁰ hate crime statutes,¹¹ and the Thirteenth Amend-

SOC. REV. 691, 694-95 (1992). A symposium on domestic violence containing varying analyses and interpretations of these sorts of studies is found at 83 J. CRIM. L. & CRIMINOLOGY 1 (1992). Notable articles include Franklyn W. Dunford, *The Measurement of Recidivism in Cases of Spousal Assault*, 83 J. CRIM. L. & CRIMINOLOGY 120 (1992); Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1 (1992); Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137 (1992); cf. Cynthia G. Bowman, *The Arrest Experiments: A Feminist Critique*, 83 J. CRIM. L. & CRIMINOLOGY 201 (1992); Lisa A. Frisch, *Research That Succeeds, Policies That Fail*, 83 J. CRIM. L. & CRIMINOLOGY 209 (1992); Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 217 (1992).

⁸ See LEONARD KARP & CHERYL L. KARP, *DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE* (1989); Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543 (1992); Rhonda L. Kohler, Note, *The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025 (1992).

⁹ See *Hynson v. City of Chester*, 864 F.2d 1026 (3d Cir. 1988) (section 1983 action by woman's family against police for failure to arrest abusive boyfriend on the day before he murdered her); *Watson v. Kansas City*, 857 F.2d 690 (10th Cir. 1988) (section 1983 action against police department that harassed and threatened woman who reported incidents of abuse by her police-officer husband, failed to respond to her calls, and took no disciplinary action against husband); *Bartalone v. Berrien County*, 643 F. Supp. 574 (W.D. Mich. 1986) (incident involving an attempted murder and a suicide followed police failure to fulfill promise to arrest batterer whose wife had reported numerous incidents of abuse and threats to kill her); *Bruno v. Codd*, 393 N.E.2d 976, 980 (N.Y. 1979) (lawsuit by 12 battered women resulted in consent judgment with New York City Police acknowledging duty to protect battered women to the same degree as other victims of violent crime); *Nearing v. Weaver*, 670 P.2d 137 (Or. 1983) (holding no immunity for police in failure to protect victim of domestic violence); see also Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788 (1986) (suggesting ways in which police departments could improve their responses to, and treatment of, domestic violence). In *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), the court awarded \$2.3 million to the plaintiff for equal protection violation by police who repeatedly refused to respond to violence in domestic situation. See Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After DeShaney v. Winnebago County Department of Social Services*, 75 CORNELL L. REV. 1393 (1990).

The Supreme Court's opinion in the *DeShaney* case blunts the force of some of the opinions cited above, prohibiting § 1983 damages for the state's failure to protect victims of "private" violence, as there is no such affirmative constitutional duty. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196-97 (1989). The opinion does not, however, preclude § 1983 actions for discrimination under the Equal Protection Clause in failing to protect victims of domestic violence to the same extent as other victims of violence. According to some commentators, actions for failure to enforce mandatory arrest statutes or violations of civil protection orders, among others, may survive *DeShaney* as well. See Gary M. Bishop, Note, *Section 1983 and Domestic Violence: A Solution to the Problem of Police Officers' Inaction*, 30 B.C. L. REV. 1357 (1989); Caitlin E. Borgmann, Note, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. REV. 1280 (1990); Harper, *supra*. In any event, the litigation successes prior to *DeShaney* were part of an educational process that has led to improved police intervention in domestic violence situations.

¹⁰ See, e.g., Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994); Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507 (1993); Renee Holt, *Women's Rights and International Law: The*

ment's bar on involuntary servitude.¹²

One retrospective legal reform movement is the movement for executive clemency for women convicted of crimes in the killing of their violent partners. In December 1990, a few weeks before he left office, Governor Richard F. Celeste of Ohio fueled a nationwide clemency movement by announcing the release of more than twenty women imprisoned for killing their batterers.¹³ In February 1991, Governor William D. Schaefer of Maryland followed suit, granting clemency to eight women.¹⁴ Each governor felt that the imprisoned women deserved clemency as a group, in part because full histories of their abuse had not been presented at trial.¹⁵

In 1991, Governor William Weld of Massachusetts amended the guidelines for commutation of sentences, a form of executive clemency, to include "a history of abuse [that] significantly contributed to . . . the offense."¹⁶ In response to this perceived invitation, eight women who had killed their bat-

Struggle for Recognition and Enforcement, 1 COLUM. J. GENDER & L. 117 (1994); Dorothy Q. Thomas & Michele E. Easley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119 (1995).

11 See, e.g., LOIS COPELAND & LESLIE R. WOLFE, *VIOLENCE AGAINST WOMEN AS BIAS-MOTIVATED HATE CRIME: DEFINING THE ISSUES* (1991). The Violence Against Women Act treats domestic violence as a gender-motivated hate crime. See Violence Against Women Act, *supra* note 5; see, e.g., 138 CONG. REC. H9134-201 (daily ed. Sept. 23, 1992) (statement of Rep. Ramstad); 138 CONG. REC. H1107-201 (daily ed. Mar. 9, 1992) (statement of Rep. Morella).

12 See Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992).

13 In addition, one woman was pardoned and another had her death sentence reduced to life imprisonment as a result of Celeste's clemency decisions. See Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL. 1, 2, 21-22 (1994); Isabel Wilkerson, *Clemency Granted to 25 Women Convicted for Assault or Murder*, N.Y. TIMES, Dec. 22, 1990, at 1. Governor Celeste had long advocated on behalf of battered women. In fact, upon moving to Columbus to become lieutenant governor of Ohio in the mid-1970s, he turned his Cleveland home into a battered women's shelter. *Id.* at 11. As a condition of their release, the women whose sentences he commuted were required to perform 200 hours of community service related to domestic violence. See Ammons, *supra*, at 3 n.4.

14 See Janet Naylor, *Schaefer to Free 8 Battered Women Who Fought Back*, WASH. TIMES, Feb. 20, 1991, at A1.

15 See Alison M. Madden, *Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum*, 4 HASTINGS WOMEN'S L.J. 1, 4-5 (1993). The governors of California, Connecticut, Florida, Illinois, Iowa, Louisiana, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, and Tennessee have also granted commutation of sentences to imprisoned battered women on an individual basis. See BARTLETT, *supra* note 4, at 562; Ammons, *supra* note 13, at 4; Madden, *supra*, at 5 n.14. Clemency campaigns are ongoing in a number of states. See Robert S. Capers, *Group Seeks Freedom for Women Who Kill Abusers*, HARTFORD COURANT, Nov. 8, 1992, at A1; Jane Gross, *Abused Women Who Kill Now Seek Way Out of Cells*, N.Y. TIMES, Sept. 15, 1992, at A16; Katie Long, *Clemency Efforts for Battered Women*, ATLANTA J. CONST., Apr. 26, 1992, at A7. Judith McMorrow reports that a March 1993, Nexis computer search of major national newspapers found that there were clemency movements for battered women in 14 states: Arizona, California, Connecticut, Florida, Georgia, Illinois, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Texas, and Washington. See Judith A. McMorrow, *The Power and Limits of Legal Naming: A Case Study of "Battered Woman Syndrome"*, in THE EYES OF JUSTICE 217, 230 n.2 (Roberta Kevelson ed., 1993).

16 Doris S. Wong, *Board Urges Clemency for 2 in Cases Tied to Battered Women's Syndrome*, BOSTON GLOBE, Mar. 4, 1994, at 35.

terers and were imprisoned in the women's prison in Framingham, Massachusetts, filed petitions for commutation of their sentences on February 14, 1992.¹⁷ These women, who identified themselves as a group, were widely known as the Framingham Eight. Public commutation hearings were held in seven of the cases.¹⁸ Governor Weld commuted only two of the sentences.¹⁹

The Framingham Eight received support and assistance from the community of women's advocacy groups who, among other things, recruited attorneys to represent each of the eight women in their search for sentence relief.²⁰ I agreed to represent one of the petitioners and organized a defense team of faculty, alumni, and students at Boston College Law School. In all of the cases, the attorneys, the community groups, and the women themselves sounded one theme: since each woman had killed her batterer in order to save her own life, justice required that each be released from prison immediately.²¹

Despite the similarity of the cases in the minds of the petitioners and the community advocates—who best advanced their aims by emphasizing similarities—many significant differences were also revealed in the public hearings of the cases before the Massachusetts Board of Pardons and Parole. For example, the underlying factual circumstances of the cases were widely divergent. Of all the differences between the cases, however, the one that seemed

17 See Toni Locy, *Weld Urged to Free 8 Women*, BOSTON GLOBE, Feb. 15, 1992, at 15, 17.

18 The Advisory Board of Pardons, a special seating of the Massachusetts Parole Board, is empowered to make commutation recommendations to the governor based solely on a written petition or upon a hearing of the petitioner's claims. See MASS. GEN. L. ch. 127, § 154 (1992); MASS. REGS. CODE tit. 120, §§ 901.05, 901.12(5) (1993). In the cases of the Framingham Eight, the Board elected to hold hearings on seven of the petitions. It deferred its involvement in one case which was still pending on direct appeal. See Toni Locy, *Woman's Life Sentence Is Commuted*, BOSTON GLOBE, Apr. 29, 1993, at 1.

19 The Governor's decision to commute a sentence must also be approved by the Massachusetts Governor's Council. See MASS. GEN. L. ch. 127, § 152 (1992). This body is currently composed of eight elected councilors and the lieutenant governor. Toni Locy, *Weld Backs Commutation for 4 Inmates*, BOSTON GLOBE, Jan. 21, 1993, at 29. The Governor's Council chose to hold fact-finding hearings fully repetitive of the hearings conducted by the Advisory Board of Pardons. In April 1993, by a split decision, the Council approved Governor Weld's commutation of one petitioner's life sentence. See Locy, *supra* note 18, at 1. In September 1993, by a split decision, the Council approved Weld's commutation of another petitioner's sentence. See Mary E. Greenwald & Mary-Ellen Manning, *When Mercy Seasons Justice: Commutation for Battered Women Who Kill*, BOSTON B.J., Mar./Apr., 1994, at 14-15; *Three Down, Five to Go*, BOSTON GLOBE, Sept. 24, 1993, at 18. In part as a result of the spotlight of attention cast during the commutation process on members of the Governor's Council, all but one of whom were male, several women were elected to the Governor's Council in the next election. See Michael Kenney, *Governor's Council: Old-Boy Era Ends*, BOSTON GLOBE, Dec. 4, 1994, at City 1.

Governor Weld sent no other cases to the Governor's Council for approval of grants of commutation. One petitioner was released through the appellate process when a trial judge reduced her sentence to time served. See Doris S. Wong, *Woman Is Free in Killing of Boyfriend*, BOSTON GLOBE, July 2, 1993, at 18. Another petitioner was released by the parole board on early parole. Three petitioners were paroled at their first eligibility date. One petitioner remains incarcerated.

20 See Greenwald & Manning, *supra* note 19, at 3 (describing recruitment by the Women's Bar Association's "Framingham Project").

21 See *id.* at 12 ("The Framingham Eight . . . managed to survive their batterers' final lethal attacks by fighting back," which led to their "unjust incarceration.").

to make a profound difference was this: seven of the eight women had killed a man; the eighth woman had killed another woman.²²

The not inconsiderable difficulties that each of the petitioners encountered in receiving a fair hearing of her claims seemed proportional to the degree to which she varied from an idealized image of a woman.²³ A growing literature describes the public's construction of such an idealized figure in the domestic violence context.²⁴ One characteristic deeply inscribed in the figure of the battered woman, though not explicitly identified, is that she is heterosexual.²⁵ Not surprisingly, the lesbian petitioner—the one who violated this unspoken, yet critically important, norm—faced the longest odds in her struggle to be seen and heard.²⁶

In reflecting on our representation of one of the seven petitioners convicted of killing her male partner, I came to recognize a problem not fully apparent to me at the start. By using the concepts and language commonly

²² See Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273 (1993) (describing representation of the lesbian petitioner in the context of the general lack of recognition of domestic violence in gay and lesbian relationships).

²³ For some time, feminists have attempted to expose the deleterious consequences of deeply ingrained cultural stereotypes—such as good versus bad women—on women's lives. See, e.g., ANDREA DWORKIN, *WOMAN HATING* 17-46 (1974).

²⁴ See Sharon A. Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 193-98 (1991) (arguing that stereotypes of battered women who kill their abusers as passive, emotional, and dependent create problems for battered black women, who are not seen as fitting this image); Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003 (same); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 144-50 (1985) (noting that battered women on trial for killing their abusers do not benefit from expert testimony unless they fit a rigidly-defined and narrowly-applied definition of a battered woman); Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense": Towards a New Understanding*, 19 FORDHAM URB. L.J. 567, 581 (1992) (describing prevailing images of "good" battered women and "bad" battered women that have emerged from increased public awareness of intimate violence); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 24-26 (1991) (describing problems associated with identifying oneself as a "battered woman" and the stereotypical notions of women's experience that the term implies); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 214-15 (1986) (arguing that "battered woman syndrome" can be seen to reinforce stereotypes of women as passive, sick, powerless, and victimized).

²⁵ See *infra* notes 117-126 and accompanying text.

²⁶ From some perspectives, use of the word "lesbian" is problematic. First, not all women who have women partners identify as lesbians. Second, use of the word implies that the category "lesbian" has clear boundaries that women fall either within or without. Third, use of the term "lesbian" implies that identity is unidimensional and that the multiple components of identity are separable. Finally, the word implies that the category "lesbian" is naturally occurring rather than socially constructed. Nonetheless, I use the word "lesbian" and the equally problematic words "gay," "homosexual," and "heterosexual" because, despite their contingency, these categories have content and consequences when assigned or asserted in our social world. For further discussion of these issues with reference to other categories of subordination, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296-99 (1991). Crenshaw asserts: "At this point in history, a strong case can be made that the most critical resistance strategy for disempowered groups is to occupy and defend a politics of social location rather than to vacate and destroy it." *Id.* at 1297.

found in the literature on battering to describe the issues in our client's case, we unwittingly participated in a process that reinforced the heterosexual norm for intimate violence. In so doing, we helped lengthen the odds for the lesbian petitioner.

The norm-reinforcing process, a trap for the well-meaning, works simply by speaking of the problem of battering, because the recognized discourse for discussing intimate violence has emerged from the problem of male violence inflicted on female intimates.²⁷ Those who developed the discourse sought to portray accurately the gothic horrors of battering in heterosexual relationships. They did so effectively, calling public attention to a pervasive and pervasively overlooked system of brutality and contributing to an understanding of the women caught in these nightmarish situations.

Despite their popular success in exposing and naming the problem of heterosexual battering, these activists suggested that the entire problem of battering consisted of male violence against female intimates.²⁸ In other words, they falsely universalized their gender-specific accounts.²⁹ The heterosexual norm was never stated. By failing to circumscribe the boundaries of the particular problem upon which they actually focused, these activists silently inscribed heterosexuality into the meaning of battering. By describing heterosexual battering as battering, they left battering that occurred outside of heterosexual contexts not only unrecognized, but unrecognizable.

Those attuned to the workings of heterosexism will recognize this all-too-familiar dynamic. The very conceptualizations that made a crucial difference in societal understandings of battered heterosexual women inflicted further injury on abused lesbians and gay men who were already injured by violent lovers. Were it not for the comparative reference of the case of the lesbian petitioner juxtaposed with our heterosexual client's case, I would not have noticed this dynamic at work. Such is the power of privilege.³⁰

²⁷ See *infra* notes 66-157 and accompanying text.

²⁸ See *infra* notes 117-126 and accompanying text.

²⁹ The problem of false universalism in feminist theory is one version of feminism's antiesentialist critique. See ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 3 (1988) ("Any attempt to talk about all women in terms of something we have in common undermines attempts to talk about the differences among us, and vice versa."); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990) ("[I]n feminist legal theory, as in the dominant culture, it is mostly white, straight and socioeconomically privileged people who claim to speak for all of us."); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 47-56 (1988) ("[F]eminists make the mistake we identify in others—the tendency to treat our own perspective as the single truth—because we share the cultural assumptions about what counts as knowledge, what prevails as a claim, and what kinds of intellectual order we need to make sense of the world."); cf. Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 22 (1991) (arguing that it is sexism that assumes all women are the same); e. christi cunningham, Note, *Unmaddening: A Response to Angela Harris*, 4 YALE J.L. & FEMINISM 155 (1991) (arguing that not all feminists engage in false universalizing).

³⁰ See Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987). Minow observes:

The more powerful we are, the less we may be able to see that the world coincides with our view In contrast, the more marginal we feel from the world . . . the more likely we are to glimpse a contrast between some people's perceptions of

A professional responsibility issue that should have been apparent to me from the outset of my involvement in the Framingham Eight clemency cases became apparent to me only midstream in the project: our heterosexual client was rendered more comprehensible by the discourse of battering, but this gendered language made the lesbian petitioner seem even less comprehensible.³¹ Did undivided loyalty to our client mean that we should ignore the effect of our representation on another case? Should we use the stereotyped imagery that fit our client's situation even if we undermined someone else seeking relief in the same forum? Was there any relevance to the context of these cases in which a group of female prisoners had made a conscious political decision to file commutation petitions *en masse* despite their expectation that decisionmakers would make relative judgments of the worth of each case? Should our duty of loyalty be influenced by our client's feelings of solidarity with the other petitioners? In whom did this judgment properly reside?

This Article explores and questions the construction of gender roles in the conversation on intimate violence. Part I begins by describing the phenomenon of intimate violence in gay and lesbian relationships. Part II then examines how and why the contemporary discourse of intimate violence is gender-specific. This section also considers whether and how the conversation can be expanded to capture the many varieties of intimate violence without doing a disservice both to the extraordinary number of women who suffer male violence and to our understanding of that systemic brutality. In this section, I advocate expanding the conversation through the enumeration of several parallel discourses of intimate violence tied to their particular and varied contexts. Part III addresses the professional responsibility issues implicated when an attorney represents a client who conforms to gender stereotypes that inflict harm on others. Finally, this section considers whether the attorneys for the Framingham Eight should have felt an imperative to try to undo these stereotypes in the course of their representation.

I. Same-Sex Intimate Violence

Little solid information exists about the source, pattern, and frequency of intimate violence in same-sex relationships. The empirical research that

reality and our own. Yet we still may slip into the world view of the more powerful, because it is more likely to be validated.

Id. at 73-74.

³¹ During the preparation stages of the commutation project, attorneys for the lesbian petitioner sought to illuminate the hazards for their client when the other attorneys spoke of battering as a male-on-female phenomenon. Although I took this lesson to heart and attempted to abide by it, the cognitive process of coming to understand the depth and breadth of its implications and repercussions—that it was more than a matter of minding my pronouns—was a gradual one. In this Article, I hope to hasten the process of awareness for others by telescoping my slow dawning into a coherent form.

would be required to develop such understanding has only just begun.³² Moreover, such research is difficult to accomplish.³³

Although both gay and nongay people may feel compelled to conceal from others the violence in their intimate relationships, each group may experience quantitatively and qualitatively different pressures toward this decision.³⁴ In the current cultural climate, gays and lesbians may feel more pressure than most heterosexuals to conceal from others the existence of their intimate relationships.³⁵ In such a climate, acknowledging one's involvement in a gay or lesbian relationship is, in many circles, stigmatizing in itself.³⁶ Acknowledging that this relationship is a violent one may generate more disapprobation from both gay and nongay listeners than the victim can bear.³⁷ Given these realities, gathering anything resembling a randomized sampling of participants for a study of same-sex intimate violence is a challenging undertaking for any researcher, rendering suspect the reliability of claims about the nature of intimate violence in the lesbian and gay communities.³⁸

Nonetheless, the evidence that does exist, largely anecdotal in nature,³⁹ suggests that the incidence of violence in gay and lesbian relationships is pro-

³² The counterparts to the scores of books on the phenomenon of male-on-female intimate violence are: DAVID ISLAND & PATRICK LETELLIER, *MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE* (1991); NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986) [hereinafter NAMING THE VIOLENCE]; and CLAIRE M. RENZETTI, *VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS* (1992). These are the first books on the phenomena of intimate violence among lesbians and gay men. The Renzetti volume details empirical research findings about lesbian battering. The other two volumes are experientially-based.

³³ See RENZETTI, *supra* note 32, at 19 (describing the difficulties of conducting scientifically valid research in the lesbian community); Elizabeth Rhodes, *Closeted Violence: Authorities, Experts Slowly Start to Offer More Help to Battered—and Battering—Partners of the Same Sex*, SEATTLE TIMES, May 23, 1991, at F1 (quoting a source who attributes the scant statistics available to the denial of domestic violence among gays and lesbians).

³⁴ See, e.g., CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW* 130 (1989); ISLAND & LETELLIER, *supra* note 32, at 11; RENZETTI, *supra* note 32, at 106; LENORE E. WALKER, *THE BATTERED WOMAN* 72-74 (1979).

³⁵ See RENZETTI, *supra* note 32, at 19 (characterizing battered lesbians as a hidden population).

³⁶ See Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133 (1991) (listing and refuting the popular derogatory stereotypes of lesbians and gay men).

³⁷ The victim may fear that nongay listeners will find support for their negative feelings about gay and lesbian relationships by learning of the violence that some of them contain. See, e.g., Nancy Hammond, *Lesbian Victims and the Reluctance to Identify Abuse*, in NAMING THE VIOLENCE, *supra* note 32, at 190. The victim may also fear that gay and lesbian listeners will reject his or her claims of abuse out of a need to protect positive feelings about same-sex relationships. See, e.g., Mindy Benowitz, *How Homophobia Affects Lesbians' Response to Violence in Lesbian Relationships*, in NAMING THE VIOLENCE, *supra* note 32, at 198, 200; Hammond, *supra*, at 194. Indeed, the victim may not identify abuse in his or her own relationship due to the same protective feelings and the need to avoid "cognitive dissonance." See Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567, 581 (1990).

³⁸ See RENZETTI, *supra* note 32, at 11-13 (describing her study of 100 respondents as "nonrandom").

³⁹ See, e.g., ISLAND & LETELLIER, *supra* note 32 (analysis of one author's personal experi-

portional to the incidence of violence in heterosexual relationships.⁴⁰ Analysts further suggest that the dynamics of battering—its onset,⁴¹ escalation,⁴² cycles,⁴³ and difficulty of escape⁴⁴—also seem to be comparable to those oc-

ence with battering by his male partner); NAMING THE VIOLENCE, *supra* note 32 (anthology of personal accounts of living and working with lesbian battering).

40 See Rhodes, *supra* note 33, at F1 (quoting a psychologist working with the gay and lesbian communities who estimates the level of intimate violence in these communities as “no less or more prevalent than in the heterosexual community”); Jane Garcia, *The Cost of Escaping Domestic Violence*, L.A. TIMES, May 6, 1991, at E2 (“[E]xperts say [intimate violence] is as likely to occur among lesbians as among heterosexual couples.”). Of course, projections of the rate of battering in any population depend on what sorts of acts count as battering and what level of repetition establishes a battering relationship. For example, inclusion of psychological abuse as a technique of control raises projections relative to those based on physical abuse alone.

Regardless of the methodological choices that influence determinations of the incidence of intimate violence, there is no question that rates of intimate violence in heterosexual relationships are alarmingly high. The American Medical Association estimates that every year two million women are seriously assaulted and that a woman is more likely to be physically or sexually assaulted or killed by a present or former male partner than by any other attacker. See Council on Scientific Affairs, *Violence Against Women: Relevance for Medical Practitioners*, 267 JAMA 3184 (1992).

If the rate of intimate violence in gay and lesbian relationships parallels these rates, then hundreds of thousands of lesbians and gay men are victims of intimate violence. In fact, David Island, co-author of MEN WHO BEAT THE MEN WHO LOVE THEM, *supra* note 32, estimates that in the United States there are approximately 500,000 gay men and between 50,000 and 100,000 lesbians who are battered. See Joyce Price, *Domestic Violence Between Gays a Hidden Crisis, Counselors Say*, WASH. TIMES, July 20, 1990, at A3 (citing Island’s estimates).

41 Generally, the onset of violence follows the implicit or explicit decision to increase the level of commitment in the relationship. See, e.g., GILLESPIE, *supra* note 34, at 146-47 (heterosexual relationships); Breeze, *For Better or Worse*, in NAMING THE VIOLENCE, *supra* note 32, at 48, 49 (lesbian relationship).

42 The batterer’s efforts to control typically intensify over the course of the relationship, and violence becomes more frequent and more serious. See, e.g., ANGELA BROWNE, WHEN BATTERED WOMEN KILL 68-69 (1987) (heterosexual relationships); GILLESPIE, *supra* note 34, at 125-29 (heterosexual relationships); Cory Dziggel, “The Perfect Couple,” in NAMING THE VIOLENCE, *supra* note 32, at 62, 65 (lesbian relationships); Sarah, *Letting Out the Secret: Journal Entries, 1982-1984*, in NAMING THE VIOLENCE, *supra* note 32, at 113, 117 (lesbian relationships).

43 Dr. Lenore Walker first described the cyclical dynamics of heterosexual battering, characterized by a tension building phase, an acute battering phase, and a loving-repentant phase. See WALKER, *supra* note 34, at 55-70. Compare this with Lydia Walker, *Battered Women’s Shelters and Work with Battered Lesbians*, in NAMING THE VIOLENCE, *supra* note 32, at 73, 76 (“Lesbian batterers have the classic ‘honeymoon’ phase of remorse and promises that serve to control the battered woman from leaving or seeking help”); Phyllis Winfield, *Rare Program Aids Battered Lesbians, Gays: Violence Mirrors Heterosexual Abuse Incidents*, SEATTLE TIMES, Sept. 24, 1990, at E3 (“The [same-sex] couple usually goes through what psychologists term a cycle of violence. There’s the honeymoon period . . . the neutral phase when tension builds up, resentments fester Then the batterer explodes and the abuse begins.”) (quoting a clinical psychologist who works with gay and lesbian batterers and victims).

44 Angela Browne reports that over half of heterosexual women who leave their abusers are subsequently harassed and attacked by them. See BROWNE, *supra* note 42, at 110. Deciding or attempting to leave a relationship is the point at which the battering victim is likely to face the greatest danger. See GILLESPIE, *supra* note 34, at 150-52; ANN JONES, WOMEN WHO KILL 285 (1980); Barbara Hart, *Beyond the “Duty to Warn”: A Therapist’s “Duty to Protect” Battered Women and Children*, in FEMINIST PERSPECTIVES, *supra* note 1, at 234, 240. In order to expose the centrality of issues of power and control for batterers and the difficulties faced by those who wish to escape them, Martha Mahoney advocates express recognition of the crime of “separation assault.” See Mahoney, *supra* note 24, at 61-93 (depicting the dangers that separation poses for

curing in heterosexual relationships. The types of violence reported in both gay and nongay relationships range from severe psychological abuse (verbal threats, public humiliation, destruction of property, disruption of eating and sleeping patterns, isolation, abuse of children, abuse of pets) to physical and sexual abuse (pushing, shoving, slapping, punching, scratching, physically restraining, raping) to torture and life-threatening acts (carving figures in partner's skin, burning with cigarettes, shooting, stabbing).⁴⁵ Analysts also suggest that deliberate and repeated brutality and intimidation as a feature of an intimate relationship result in similar psychological and emotional consequences for victims, whether gay or nongay.⁴⁶ As yet, however, these conclusions remain tentative,⁴⁷ due to the small, nonrandom samples relied upon in existing studies.⁴⁸

women and describing the potentially improved accuracy in legal and cultural images of battered women derived from use of the term "separation assault"). Compare this perspective with Jeanne Cormier, *Coming Full Circle*, in *NAMING THE VIOLENCE*, *supra* note 32, at 124, 127 (describing the escalation in batterer's violence away from herself and onto the author after their separation).

⁴⁵ Compare BROWNE, *supra* note 42, at 14, 65, 95-103 (types of violence in heterosexual relationships) with Barbara Hart, *Lesbian Battering: An Examination*, in *NAMING THE VIOLENCE*, *supra* note 32, at 173, 173-74 (types of violence in lesbian relationships). See also ISLAND & LETELLIER, *supra* note 32, at 26-27 (describing types of abuse perpetrated by gay male batterers); RENZETTI, *supra* note 32, at 20-24 (reporting empirical findings of types of abuse suffered by respondents while involved with a lesbian batterer).

⁴⁶ Compare WALKER, *supra* note 34, at 36, 174 (describing the loss of self-esteem and the feelings of withdrawal, acquiescence, and hopelessness that a battered heterosexual woman develops as a consequence of her abuse) and GILLESPIE, *supra* note 34, at 155 (same) with Hammond, *supra* note 37, at 191-92 (describing the self-blame, denial, minimization, and loss of self-respect of battered lesbians and heterosexual women); ISLAND & LETELLIER, *supra* note 32, at 107-10 (similar findings for battered gay men) and RENZETTI, *supra* note 32, at 84 (similar findings for battered lesbians).

Abused heterosexual women, lesbians, and gay men often report that they have made one or more unsuccessful attempts to leave their batterers. Sometimes they return due to emotional attachment, the batterer's apologies and promises, or lack of support and housing. See LENORE WALKER, *THE BATTERED WOMAN SYNDROME* 26 (1984) (one quarter of women in study left temporarily after each battering incident); see also ISLAND & LETELLIER, *supra* note 32, at 139-40 (describing one author's reasons for returning to batterer); Cedar Gentlewind, *Will It Never End?*, in *NAMING THE VIOLENCE*, *supra* note 32, at 41, 45 (describing batterer's expressions of love that led victim to go back); Arlene Ishtar, *The Healing Comes Slowly*, in *NAMING THE VIOLENCE*, *supra* note 32, at 163, 168 (describing leaving and returning to batterer three times in two years). Crenshaw notes that women of color are more likely to return to a batterer due to race discrimination in employment and housing that adds to their difficulties in securing jobs and homes. See Crenshaw, *supra* note 26, at 1245-46.

⁴⁷ The assertion of sameness between heterosexual and same-sex intimate violence must be considered tentative, Mary Eaton warns, because some commentators merely posit sameness without proof, based on an appraisal that there are no good reasons to expect differences. See Mary Eaton, *Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 195 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) [hereinafter *PUBLIC NATURE OF PRIVATE VIOLENCE*].

⁴⁸ The samples used for the few studies of lesbian battering have been limited to relatively privileged white women. For example, Renzetti indicates that the 100 respondents in her study were 95% white and nearly half had college and advanced degrees. See RENZETTI, *supra* note 32, at 13-15. Eaton points out that racism may play some role in the form and function of intralesbian violence in mixed-race lesbian relationships. See Eaton, *supra* note 47, at 205 (citing Valli Kanuha, *Compounding the Triple Jeopardy: Battering in Lesbian of Color Relationships*, 9

There are, however, some potential aspects of the experience of abuse for battered gay men and lesbians that have no heterosexual equivalent. One difference is that the gay or lesbian batterer has available several additional techniques of control.⁴⁹ The batterer can threaten to expose the victim's sexual orientation, with the attendant threat of rejection, loss, discrimination, and physical jeopardy that such exposure may entail.⁵⁰ The batterer may also assert that the partner's complaints reflect inexperience with gay or lesbian relationships.⁵¹ Additionally, the batterer can seek to persuade his or her partner that the partner's self-defensive acts constitute mutual abuse,⁵² or will be perceived by others as either mutual abuse⁵³ or the only acts of abuse in the relationship.⁵⁴

Another difference in the experience of battering for abused lesbian⁵⁵ and gay victims is an even greater relative isolation than that experienced by abused heterosexual women, which intensifies the victim's vulnerability and

WOMEN & THERAPY 169 (1990)). Eaton suggests that the unrepresentativeness of the samples in the research that has been conducted means that our knowledge of lesbian battering may be distorted. See Eaton, *supra* note 47, at 205.

⁴⁹ See, e.g., Lundy, *supra* note 22, at 282-84 (noting that "[t]he same-sex batterer frequently uses homophobia as a means to maintain the control and power imbalance in the relationship in a variety of ways").

⁵⁰ See Garcia, *supra* note 40, at E2 ("If a lesbian makes her sexuality known, she can lose her family, her friends, her job, and her life.") (quoting Rebecca Redshaw, activist working with victims of lesbian battering).

⁵¹ See Lundy, *supra* note 22, at 282 (quoting Beth Leventhal, Coordinator, Network for Battered Lesbians). As Leventhal observes, the persuasive power of this technique depends on the absence of sufficient images of healthy gay and lesbian relationships as role models in the popular culture. *Id.*

⁵² See, e.g., ISLAND & LETELLIER, *supra* note 32, at 108 (batterers label relationships mutually abusive to avoid taking responsibility for the abuse they inflict); RENZETTI, *supra* note 32, at 109-10 (victims of same-sex violence are often convinced that battering is a shared problem); Donna J. Cecere, *The Second Closet: Battered Lesbians*, in NAMING THE VIOLENCE, *supra* note 32, at 21, 26 ("I allowed her to convince me that I was the one who instigated the abuse."); Hart, *supra* note 45, at 185 ("Batterers always see themselves as the victim of the battered woman.").

⁵³ See ISLAND & LETELLIER, *supra* note 32, at 16-18; RENZETTI, *supra* note 32, at 107-12 (citing to the common misperception that abuse in same-sex relationships is mutual); Robson, *supra* note 37, at 578-79. Of course, heterosexual women are subject to this interpretation of their behavior as well, because nearly half of all battered women fight back occasionally. See BROWNE, *supra* note 42, at 6-9. Absent gender opposition, however, officials have even more difficulty determining who is doing the battering. Lundy examines this problem closely and concludes that "the most serious injustice done to abused lesbians and gay men in the Massachusetts court system is the widespread abuse of mutual restraining orders in these cases." Lundy, *supra* note 22, at 296. Having a restraining order erroneously issued against any party can have serious legal consequences for that party. See *id.* at 297-98; Robson, *supra* note 37, at 579-80.

⁵⁴ If the batterer is smaller than the victim or if the couple exhibits little disparity in size, weight, or age, then the batterer may be successful in persuading others, including the victim, that he or she is also a victim or is the real victim. See ISLAND & LETELLIER, *supra* note 32, at 18, 104; RENZETTI, *supra* note 32, at 95, 103, 105, 108; Hart, *supra* note 45, at 185.

⁵⁵ Eaton suggests that other potential differences may exist between intimate lesbian violence and intimate heterosexual violence, but research has yet to explore them. For example, she speculates that the relationship between sex and violence may be different in lesbian relationships than in heterosexual relationships. In other words, Eaton holds open the possibility that violence may be sexualized differently in gay relationships than in heterosexual relationships. See, e.g., Eaton, *supra* note 47, at 205-06.

the batterer's power.⁵⁶ Issues of sexual orientation may have cut off the abused from potential sources of support,⁵⁷ or fear of estrangement may have inhibited disclosure of his or her sexual preference.⁵⁸ Conversely, the fact that the abused may have worked hard to have the relationship accepted by others may inhibit him or her from reporting the violence.⁵⁹ Moreover, there are few social services available for battered lesbians⁶⁰ and virtually none for

⁵⁶ See Hammond, *supra* note 37, at 194; Lundy, *supra* note 22, at 285. Gay and lesbian victims with fewer sources of support experience greater levels of dependence on the batterer and increased difficulty in leaving the battering relationship. See ISLAND & LETELLIER, *supra* note 32, at 23-24, 246 (stating that homophobia often leads an abused gay man to try to preserve the battering relationship); RENZETTI *supra* note 32, at 29-30 (suggesting that hostile societal conditions lead lesbians to have greater commitment to their partners).

⁵⁷ There are many variations on these issues in gay or lesbian relationships. The family's lack of acceptance of the gay or lesbian relationship may have impaired family relations to the extent that family members are, or are perceived to be, unable or unwilling to provide assistance to the abused. See, e.g., ISLAND & LETELLIER, *supra* note 32, at 23, 100; Hammond, *supra* note 37, at 196. The batterer may not have publicly disclosed his or her sexual orientation, inhibiting the battered gay man or lesbian from revealing abuse that "outs" the abuser. See ISLAND & LETELLIER, *supra* note 32, at 245-47; Hammond, *supra* note 37, at 196. The battered gay man or lesbian may feel that gay or lesbian friends will be too protective of the image of the gay or lesbian community to provide assistance, see *supra* note 37, and will urge avoidance of mainstream institutional authorities such as police and courts. See RENZETTI, *supra* note 32, at 102, 123-24; Robson, *supra* note 37, at 587-90. All of these possibilities are related to the exacerbating effect of societal homophobia on the plight of the gay or lesbian victim of intimate violence. See Lundy, *supra* note 22, at 285-87.

⁵⁸ See ISLAND & LETELLIER, *supra* note 32, at 100, 104; RENZETTI, *supra* note 32, at 125.

⁵⁹ See RENZETTI, *supra* note 32, at 100-01.

⁶⁰ Lesbians often cannot find space in battered women's shelters because of the homophobia of shelter staff. See Linda Geraci, *Making Shelters Safe for Lesbians*, in NAMING THE VIOLENCE, *supra* note 32, at 77, 77 ("[I]t is absolutely vital to work to eliminate homophobia and heterosexism in the shelter environment. Staff and volunteer training must include specific attention to issues the battered lesbian must deal with, such as homophobia, and coming out to family and friends in the context of involvement in an abusive relationship."); Hammond, *supra* note 37, at 195-96 (citing homophobia as reason for lack of outreach by battered women's service providers to lesbian community and for lesbian victims' reluctance to seek help); Nomi Porat, *Support Groups for Battered Lesbians*, in NAMING THE VIOLENCE, *supra* note 32, at 80, 80 ("No single group of battered women has been as rejected from services, disbelieved and labelled 'divisive' as battered lesbians."). The staff may also fear the loss of funding from both public and private sources. See Geraci, *supra*, at 77-78 ("If we come out as a lesbian-sheltering shelter with lesbian staff and volunteers, we run the risk of alienating our funders and losing vital contributions."); Hammond, *supra* note 37, at 196 (same).

In 1985 Attorney General Edwin Meese nearly revoked a Justice Department grant to the National Coalition Against Domestic Violence ("NCADV") because, in part, the group was too "pro-lesbian." See Howard Kurtz, *Meese Delayed Grant When Conservatives Balked*, WASH. POST, Aug. 9, 1985, at A8. Consequently, the NCADV downplayed the involvement of its lesbian members and the grant was ultimately approved. See Howard Kurtz, *Meese Clears Disputed Grant for Aid to Battered Women*, WASH. POST, Aug. 10, 1985, at A2.

A battered lesbian may feel reluctant to seek shelter space or other support services for fear of rejection or discomfort, see Geraci, *supra*, at 77-78, and these feelings will intensify if she is disabled, a substance abuser, a non-English speaker, a person of color, or fears differential treatment for other reasons. See Kanuha, *supra* note 48 (describing racism in society and homophobia in the community of color that pose additional obstacles to getting help for a lesbian of color, as do prejudices based on class, language, and religion); see also RENZETTI, *supra* note 32, at 88-90 (stating other reasons, including substance abuse, why battered lesbians would fear rejection). Renzetti reports that few battered lesbians seek shelter space, and those who do often find the

battered gay men.⁶¹ Battered gay men or lesbians may be implicitly excluded from legal protections⁶² and police,⁶³ attorneys,⁶⁴ and judges⁶⁵ may be dismissive of, or hostile to, their claims.

II. Engendering Intimate Violence

The discourse of intimate violence is explicit about who does the battering and who suffers it. Virtually all descriptions of the problem report that men perpetrate violence against female partners and ex-partners.⁶⁶ There is

environment unwelcoming and unhelpful to them. See RENZETTI, *supra* note 32, at 76, 93-94; see also Crenshaw, *supra* note 26 (describing the effect of race and language prejudice on battered women of color.)

Unlike a battered heterosexual woman, a battered lesbian also may face the problem that her batterer may work in the battered women's movement, know the location of the shelter, or both. See, e.g., Cecere, *supra* note 52, at 30 (lesbian batterer was employed as a counselor at a battered woman's shelter). The battered lesbian in this situation may fear rejection if she seeks to expose her partner as a batterer, a feeling that the batterer can exploit. This abused woman is likely to feel unsafe in the shelter system. In addition, a lesbian may fear that her batterer will gain access to the shelter by claiming that she too has been abused or simply by inadequate precautions taken by the shelter staff who are accustomed to applying precautions to preclude access to men only. See Lundy, *supra* note 22, at 288.

⁶¹ See ISLAND & LETELLIER, *supra* note 32, at 35; Carla M. da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN'S STUDIES 251, 271 (1994); Lundy, *supra* note 22, at 287.

⁶² Some states have statutory protections in cases of domestic violence, but sometimes same-sex, unrelated couples are not included in the statutes. See, e.g., MISS. CODE ANN. § 93-21-3 (1993) ("persons living as spouses . . ."); OHIO REV. CODE ANN. § 3113.33 (Anderson 1994) ("persons living as spouses . . ."); S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1985) ("[S]pouses, former spouses, parents and children, and persons related by consanguinity or affinity within the second degree.").

One commentator argues that all domestic violence statutes that exclude same-sex partners violate the Equal Protection Clause of the Fourteenth Amendment. See Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 346-68 (1995). Courts have yet to address such a claim.

⁶³ Abused gays and lesbians report police mishandling of their complaints of abuse. See, e.g., ISLAND & LETELLIER, *supra* note 32, at 22 (citing instance where two policemen refused to file incident report about restraining order violation and referred to gay male victim of intimate violence as "she" and "this woman"); RENZETTI, *supra* note 32, at 91 (noting that police officers respond negatively to lesbian victims who are calling for assistance, use epithets, and evince attitudes such as "so two dykes are trying to kill each other; big deal"). The history of police harassment and brutality in the gay and lesbian community inhibits the reporting of intimate violence by gay and lesbian victims. See *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1542 (1989). This problem is exacerbated if the abused belongs to other communities that have a history of conflict with the police. Island and Letellier indicate that "[f]or many gay men of color, trusting the police may simply be out of the question." ISLAND & LETELLIER, *supra* note 32, at 246.

⁶⁴ See, e.g., RENZETTI, *supra* note 32, at 92 (only two of ten lesbian victims of intimate violence reported that their attorneys were helpful); cf. Angela West, *Prosecutorial Activism: Confronting Heterosexism in a Lesbian Battering Case*, 15 HARV. WOMEN'S L.J. 249 (1992) (describing one aggressive prosecution of a lesbian defendant charged with battering her partner).

⁶⁵ See Lundy, *supra* note 22, at 291.

⁶⁶ See *infra* notes 117-121 and accompanying text; see also SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* (1982) (history of the battered women's movement).

an empirical dimension to this assertion, to be sure, for this imagery captures a tragically large number of cases of battering.⁶⁷ Additionally, the domestic violence literature generally suggests that men batter in certain ways,⁶⁸ for certain reasons,⁶⁹ and with certain sorts of consequences for the women they batter.⁷⁰

Although these gender-specific depictions of intimate violence seem to describe a large number of cases, they are overstated. If the preliminary findings regarding violence in same-sex relationships are accurate,⁷¹ then the primary literature of domestic violence is underinclusive and in need of both elaboration and revision to take fuller account of the phenomena it explores. This literature, in purporting to describe the problem of intimate violence while describing a problem of heterosexual intimate violence, constructs gender roles in a way that heightens the difficulty of seeing the problem of intimate violence in same-sex relationships. In Kimberlé Crenshaw's terms, feminism's primary domestic violence literature, while profoundly important, represents a "dominant resistance discourse."⁷² This discourse fails to account for subordination that is partially explained by ideological systems other than, and in combination with, patriarchy.⁷³

In the resistance discourses that are dominant within feminism, intimate violence is theorized in particular ways. Gender-specificity is characteristic of the predominant feminist theories because intimate violence is perceived to be rooted in the historical and ideological function of marriage and the family in American society.⁷⁴ A version of these theories, intended as a representative composite, is elaborated below.

A. Feminist Theoretical Accounts of Intimate Violence

Nineteenth-century common law institutionalized a man's ownership and control of the woman he married.⁷⁵ Blackstone's *Commentaries* detail

⁶⁷ See BROWNE, *supra* note 42, at 8 (reporting studies that find 94-95% of all partner assaults are perpetrated by men on women); Council on Scientific Affairs, *supra* note 40, at 9 (noting that of the nearly 40,000 people in the United States killed by an intimate partner between 1976 and 1987, 61% were women killed by a male partner or ex-partner); Mac D. Hunter, *Homosexuals as a New Class of Domestic Violence Subjects Under the New Jersey Prevention of Domestic Violence Act of 1991*, 31 U. LOUISVILLE J. FAM. L. 557, 562-63 (1992-93) (reporting the high incidence of male to female domestic violence).

⁶⁸ See *supra* notes 41-44 and accompanying text.

⁶⁹ Reasons can be analyzed on several different levels. At one important level of explanation, batterers act out of a desire to exert power and control over the partner. See, e.g., SCHECHTER, *supra* note 66, at 219-24; JAN E. STETS, DOMESTIC VIOLENCE AND CONTROL 101-11 (1988); Mahoney, *supra* note 24, at 53-60; Ptacek, *supra* note 1, at 247-49. Another level of explanation is found at notes 75-94 *infra* and accompanying text. This explanation views male-on-female battering as one manifestation of a system of subordination of women that has long been a feature of American society.

⁷⁰ See *supra* note 46 and accompanying text.

⁷¹ See *supra* note 40 and accompanying text.

⁷² Crenshaw, *supra* note 26, at 1243 n.4.

⁷³ See *id.*

⁷⁴ See *infra* notes 75-94 and accompanying text.

⁷⁵ See generally NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 17-29 (1982) (describing common law system

the common law doctrines of unity and merger—components of the principle of coverture⁷⁶—that enforced the hierarchical arrangements subordinating married women.⁷⁷ Although a woman's first identity was derived from her father, her identity merged into her husband's at the moment of marriage.⁷⁸ A husband was entrusted with control of all of the marital property.⁷⁹ Married women were unable to contract or to own property, were presumed incompetent to engage in worldly matters, and were deemed specially suited to tending a home and raising children.⁸⁰ Precluded from the public realm, women traded sexual, reproductive, and domestic services for the support and protection of husbands upon whose wages they depended for material sustenance and upon whom they relied for social identity.⁸¹

Law also institutionalized the physical rights of men over their wives. Marital rape was not rape.⁸² The common law, imported from Britain to the American colonies, permitted a husband "moderate correction" of his wife.⁸³

whereby woman's identity merged with husband's and he gained control over her property at instant of marriage); John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1047 (1972) (describing common law concept of husband's guardianship over his wife as theoretical justification for subordination of women).

76 JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 367 (3d ed. 1993) ("At the instant of marriage, a woman moved under her husband's protection or cover (becoming a femme covert). She ceased to be a legal person for the duration of the marriage. Husband and wife were regarded as one, and that one was the husband.")

77 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442-45 (9th ed. 1778).

78 See *id.* at 442; BASCH, *supra* note 75, at 17; *cf.* *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971) (upholding state regulation requiring wife to use husband's surname to obtain drivers license).

79 See BASCH, *supra* note 75, at 17; MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA xv, 41, 81 (1986); see also *Ferguson v. Kinsland*, 93 N.C. 337 (1885) (deed executed by a married woman with her husband's separate written assent but without his joint signature on the deed was legally invalid).

80 One of the best known descriptions of the ideology of men's and women's separate spheres is Justice Bradley's concurring opinion in *Bradwell v. Illinois*:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

83 U.S. (16 Wall.) 130, 141 (1872). See also Linda Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988) (focusing on analyses of the various ways that the separate spheres ideology has operated).

81 See Johnston, *supra* note 75, at 1071.

82 See, e.g., *Frazier v. State*, 86 S.W. 754, 755 (Tex. Crim. App. 1905) ("[A]ll the authorities hold that a man cannot himself be guilty of actual rape upon his wife; one of the main reasons being the matrimonial consent which she gives when she assumes the marriage relation, which the law will not permit her to retract in order to charge her husband with the offense of rape."); MODEL PENAL CODE § 213.1 cmt. 8(c) (1980) (explaining historical and contemporary reasons for retaining the spousal exclusion for rape). Although some states retain the marital rape exemption, other states have modified or eliminated the exemption through judicial opinions or legislative action. See BARTLETT, *supra* note 4, at 520-23.

83 See *Bradley v. State*, 1 Miss. (1 Walker) 156, 157-58 (1824) (justifying moderate beating

The failure to prohibit many forms of physical and sexual assault within marriage suggests that the allocation of control of all marital property to the husband was legally buttressed by physical violence. The ideology of women's natural disposition for nurturance and connection, the denial of opportunities for a woman to engage in reasonably remunerated labor, and the stigmatization of single women and all female sexual behavior outside of legal marriage, all mingled with the inequality incorporated into the structure of the marriage institution to establish not only a complete system of female subordination, but also a likelihood of widespread assent to it.⁸⁴

The legal reforms of the late nineteenth and twentieth centuries brought adult women separate legal identities apart from their husbands and removed the formal incidents of female subordination from the institution of marriage and the family.⁸⁵ Yet just as racial segregation can persist despite its formal illegality, so female inequality, and its requisite ideology of female weakness and inferiority, have survived legal reforms. Women still have lesser earning power than men.⁸⁶ Empirical data suggests that many occupations remain

of wife); *State v. Rhodes*, 61 N.C. 453 (1868) (upholding trial court's judgment that no crime lay in husband whipping wife with "a switch no larger than his thumb"); BLACKSTONE, *supra* note 77, at 444 ("The husband . . . might give his wife moderate correction."); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 136 (4th ed. 1971) ("A husband or father, as the head of the household, was recognized by the early law as having authority to discipline the members of his family. He might administer to his wife 'moderate correction' and 'restrain' her by 'domestic chastisement.'"); Beirne Stedman, *Right of Husband to Chastise Wife*, 3 VA. L. REG. 241, 243 (1917) ("By the old common law rule the husband had the right to inflict moderate personal chastisement on his wife . . ."). Although many feminist commentators indicate that *State v. Rhodes* is an example of the application of the common law "rule of thumb," see WALKER, *supra* note 34, at 12; Terry Davidson, *Wife Beating: A Recurring Phenomenon Throughout History*, in *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* 2, 18 (Maria Roy ed., 1977), debate continues over whether the origin of the phrase "rule of thumb" lies in a legal doctrine authorizing wife-beating. See CHRISTINA H. SOMMERS, *WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN* 204-05 (1994); Henry A. Kelly, *Rule of Thumb and the Folk-law of the Husband's Stick*, 44 J. LEGAL EDUC. 341 (1994). There is, however, no dispute that the law endorsed men's dominion, including some forms of physical power and control, over their wives.

⁸⁴ See generally CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 26-29 (1980) (discussing the ideology of separate spheres and the presumption that 19th-century women were specially suited to be guardians of morality); Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151 (1966) (detailing the manipulation of women into believing they were meant to strive for piety, purity, submissiveness, and domesticity within the home); see also Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1543-48 (1983) (describing how the market reinforces subordinate status of women by reproducing the inequalities of family).

⁸⁵ The most well-known reforms were the Married Women's Property Acts. For an analysis of the mixed motives for these reforms, see Richard H. Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIST. 3 (1985); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983).

⁸⁶ Wage disparities between men and women have improved, but still persist. See FRANCINE D. BLAU & MARIANNE A. FERBER, *THE ECONOMICS OF WOMEN, MEN, AND WORK* 177 (1986); CLAUDIA GOLDIN, *UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN* 61 (1990); Jane Friesen, *Alternative Economic Perspectives on the Use of Labor Market Policies to Redress the Gender Gap in Compensation*, 82 GEO. L.J. 31, 31 (1993);

difficult for a woman to enter and their top rungs even more difficult for her to reach.⁸⁷ Labor, especially within the family, is still allocated along gender lines in many instances, and women carry a disproportionate burden for the care of dependents.⁸⁸ Moreover, the distinction between matters public and matters private appears sufficiently powerful to stand in for the doctrine of "moderate correction" of wives as an ideological mechanism under which wife abuse has been culturally condoned.⁸⁹

The legal system long has been reluctant to respond to assaults within the family and has rationalized this stance as the preservation of family privacy.⁹⁰ "It's a domestic dispute" remains a widely understood contemporary code for non-intervention despite improvements wrought after years of advocacy by feminist activists.⁹¹ Feminist commentators suggest that law's begrudging involvement in family violence represents the *de facto* version of *de*

see also Tim Bovee, *Census Confirms Male-Female Pay Gap; It Gets Worse with Age*, SAN DIEGO UNION-TRIB., Nov. 14, 1991, at A1 ("A college-educated woman aged 18 to 24 earns an average of 92 cents for every dollar earned by a man of the same age and education.").

⁸⁷ Women remain concentrated in lower-paying occupations. Gender norms lead to women's underrepresentation in traditionally male occupations and in high-management posts. See generally Mary Ann Mason, *Beyond Equal Opportunity: A New Vision for Women Workers*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393, 396 (1992) ("Employed women are clustered into four industry groups with almost seventy percent in services and retailing and state and local government. . . . [T]hese jobs are generally lower paying."); Maxine N. Eichner, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397, 1397 (1988) (similar statistics).

⁸⁸ See Julie Brines, *Economic Dependency, Gender, and the Division of Labor at Home*, 100 AM. J. SOC. 652, 652 (1994) ("Housework remains primarily 'women's work' despite substantial change in women's employment patterns and in attitudes once thought to undergird the sexual division of labor."); Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 729 (1986) ("The feminist movement has not yet freed women from shouldering a disproportionate burden of both housework and childrearing responsibilities."); Gillian K. Hadfield, *Household at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89, 97 (1993) ("Women continue to be responsible for household work even when their market income exceeds that of men."); Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1331 (1983) ("Child-care and homemaking are almost invariably performed by women even when both parents are present in the home and both parents have wage jobs outside the home.").

⁸⁹ See, e.g., R. EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* (1979) (exploring ways in which public/private distinction reinforces social acceptance of violence against women); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991) (same); Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 151, 153-57 (David Kairys ed., 1990) (same).

⁹⁰ See *State v. Rhodes*, 81 N.C. 453, 459 (1868) ("It will be observed that the ground upon which we have put this decision, is not that the husband has the right to whip his wife much or little; but that we will not interfere with family government in trifling cases We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.").

⁹¹ See, e.g., *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421 (9th Cir. 1988) (reversing the district court's dismissal for failure to state a claim), *modified on other grounds*, 901 F.2d 696 (9th Cir. 1990). In this case, a battered woman sued the police after a three-year period during which she reported numerous incidents of abuse, but police failed to protect her. Upon dismissal, her lawyer refused to continue to pursue the case. Balistreri won her appeal *pro se*. *Id.* at 1423.

jure coverture.⁹² Whereas physical violence once reinforced coverture—the official patriarchal structure of the family—so, the argument runs, does violence play an even more crucial role in maintaining the subordination and social control of women now that the formal incidents of marital inequality have been dismantled.⁹³ Stated simply, men's abuse of women continues within the informal coverture of contemporary American society.⁹⁴

B. Theoretical Conclusions and Exclusions

There is a compelling momentum to this explanation of the contemporary cultural manifestations of a historically documented system of gender-based allocations of power. If nothing else, the account helps to explain the sheer magnitude of the present-day problem of male-on-female violence.⁹⁵ Nevertheless, the explanation is clearly incomplete. As an understanding of the causes of violent assaults on intimates, the informal coverture theory affects what—or, even more precisely, who—represents the reality of these assaults.

First, the theory makes specific reference to the situation of white, middle-class and upper-class women, but does not account for historical variations by race and class.⁹⁶ For example, as a result of the American system of race subordination, slaves were forbidden to marry;⁹⁷ male slaves, who were considered property, obviously could acquire no control of marital property; and the families of slaves, in response to prohibitions on their existence, were structured far differently than the informal coverture theory describes.⁹⁸

⁹² See Isabel Marcus, *Reframing "Domestic Violence": Terrorism in the Home*, in PUBLIC NATURE OF PRIVATE VIOLENCE, *supra* note 47, at 11.

⁹³ See DOBASH & DOBASH, *supra* note 89, at ix ("The fact that violence against wives is a form of a husband's domination is irrefutable in the light of historical evidence" and was institutionalized to enforce women's roles.); LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 288 (1988) ("Men's violence against some women . . . reinforces all women's subordination and all men's dominance."); Michele Bograd, *Feminist Perspectives on Wife Abuse: An Introduction*, in FEMINIST PERSPECTIVES, *supra* note 1, at 11, 14 ("Although there are many ways that men as a group maintain women in oppressed social positions, violence is the most overt and effective means of social control. . . . The reality of domination at the social level is the most crucial factor contributing to and maintaining wife abuse at the personal level.").

⁹⁴ See Marcus, *supra* note 92.

⁹⁵ For a recent review of literature discussing the prevalence of violence against women, see Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers Who Appreciates Trifles*, 33 AM. CRIM. L. REV. 229, 281-96 (1996).

⁹⁶ See Laura F. Edwards, *"The Marriage Covenant is at the Foundation of All Our Rights": The Politics of Slave Marriages in North Carolina After Emancipation*, 14 LAW & HIST. REV. 81 (1996) (nineteenth-century marriages, while widely understood to be unequal relationships between husband and wife, varied considerably across race and class).

⁹⁷ See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 32, 52-53 (1976) (examining the political importance of forbidding slaves to enter legal marriages); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 129-32 (1985) (same).

⁹⁸ See generally HERBERT GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925* (1976); JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* (1985); ANN PATTON MALONE, *SWEET CHARIOT: SLAVE FAMILY AND HOUSEHOLD STRUCTURE IN NINETEENTH-CENTURY LOU-*

Consequently, the theory may simply be inapplicable outside of its specific, though unacknowledged, context.

On the other hand, despite the use of the unmodified categories "man" and "woman" as false universals in the prior account, it is conceivable that the described system of gender hierarchy was sufficiently entrenched in the white privileged classes to become the primary cultural system. After all, the white middle class often defines the mainstream such that its ideology becomes the most pervasive cultural force in American society. Even if this is so, however, the chain of argument requires more links than have been made to justify its generalization beyond the apparent limits of its referents into an overarching ideological explanation.

Suppose the theory does have some cultural reach beyond the context that engendered it (in both senses of the word). Could it possibly reach far enough to account for intimate violence outside a heterosexual context? This seems unlikely. On the most obvious level, a theory in which legal notions of property in the institutions of marriage and the traditional family are central explanatory variables does not address the relationships of gay and lesbian people.⁹⁹ Gay men and lesbians have been legally barred from the institution of marriage.¹⁰⁰ Their legal interest in their relationships has not been fully recognized.¹⁰¹ Their custody and visitation of children, even those they have borne,¹⁰² parented,¹⁰³ or both is continuously in jeopardy. Realistically, the

ISIANA (1992); DEBORAH G. WHITE, *AR'N'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH* (1985).

⁹⁹ See Eaton, *supra* note 47, at 212.

¹⁰⁰ See, e.g., *Adams v. Howerton*, 486 F. Supp. 1119, 1125 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); *Jones v. Hallahan*, 501 S.W.2d 588, 589-90 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Murphy v. State*, 653 S.W.2d 567, 569 (Tex. Ct. App. 1983); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. 1974). *But see Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that denial of marriage licenses to same-sex couples violated equal protection of the laws under the state constitution). The *Baehr* case is currently on remand to determine if the state can establish a compelling reason for its discriminatory conduct. If the ruling in *Baehr* survives, same-sex marriages will be legally available in the United States for the first time. It will then remain to be seen whether other states will grant full faith and credit to same-sex marriages legally entered in Hawaii.

¹⁰¹ See, e.g., *Adams*, 486 F. Supp. at 1125 (denying immigration to Australian in homosexual union with United States citizen); *Coon v. Joseph*, 237 Cal. Rptr. 873, 874 (Cal. Ct. App. 1987) (holding that gay partner does not qualify as "close relationship" for purposes of recovery for tort of emotional distress); *Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410, 412 (Cal. Ct. App. 1985) (holding that denial of dental care benefits to homosexual partner of state employee covered by "family" dental plan does not violate California's equal protection clause); *In re Guardianship of Kowalski*, 382 N.W.2d 861, 868 (Minn. Ct. App. 1986) (denying lesbian guardianship of partner who had become comatose following an accident); *In re Estate of Cooper*, 564 N.Y.S.2d 684, 688 (N.Y. Sup. Ct. 1990), *aff'd*, 592 N.Y.S.2d 797 (N.Y. App. Div. 1993) (disallowing current partner's rights to inherit as surviving spouse). *But see Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 50 (N.Y. 1989) (extending rent control benefits to surviving partner of leaseholder); *In re Evan*, 583 N.Y.S.2d 997, 1002 (N.Y. Sup. Ct. 1992) (allowing adoption by lesbian of partner's biological child). *Braschi* has since been codified in New York's anti-eviction regulations. See N.Y. REAL PROP. LAW § 232-a (McKinney 1996).

¹⁰² Some courts presume that a gay biological parent is unfit. See, e.g., *Constant A. v. Paul C.A.*, 496 A.2d 1, 5 (Pa. Super. Ct. 1985); *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985). Some courts view homosexuality as a negative factor. See, e.g., *In re Marriage of Diehl*, 582 N.E.2d 281, 292 (Ill. App. Ct. 1991), *appeal denied*, 591 N.E.2d 20 (Ill. 1992); *White v. Thompson*, 569

genesis of violence in gay and lesbian relationships cannot lie squarely in the legally enforced inequality of marital and family arrangements.¹⁰⁴

Nor can the genesis of violence between partners who are lesbian or gay lie in the doctrine of family privacy.¹⁰⁵ Feminists have argued powerfully that the refusal to lift the veil of privacy on the traditional family left power where it lay, thereby serving as an ideological support for the inequality of heterosexual women and the violence that is its most extreme manifestation.¹⁰⁶ But *Bowers v. Hardwick*¹⁰⁷ makes all too clear that the doctrine of privacy will not be readily applied to gay and lesbian relationships.¹⁰⁸

The law did intervene in the most intimate area of Michael Hardwick's life when he was arrested for consensual sex with a male partner.¹⁰⁹ As the *Hardwick* case reveals, the problem of privacy for gay men and lesbians involves the state's decision to intervene in personal family choices.¹¹⁰ It is therefore virtually the inverse of the problem of privacy for heterosexual couples.¹¹¹ This distinction in itself represents a critique of the mutability of privacy doctrine, but it also represents a critique of feminist theoretical accounts of intimate violence that do not notice the limitation of their analyses.

So. 2d 1181, 1184 (Miss. 1990); *G.A. v. D.A.*, 745 S.W.2d 726, 728 (Mo. Ct. App. 1987); *Jacobson v. Jacobson*, 314 N.W.2d 78, 80 (N.D. 1981); *Chicoine v. Chicoine*, 479 N.W.2d 891, 893 (S.D. 1992). But see *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985) (holding that homosexuality is not a relevant factor in a custody determination); *Stroman v. Williams*, 353 S.E.2d 704, 705 (S.C. Ct. App. 1987) (same).

¹⁰³ See, e.g., *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Cal. Ct. App. 1991) (no visitation rights for lesbian who had co-parented child since birth); *In re Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (same); see also Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990) (describing difficulties faced by lesbians in achieving recognition of parental rights); Annamay T. Sheppard, *Lesbian Mothers II: Long Night's Journey into Day*, 8 WOMEN'S RTS. L. REP. 219 (1985) (same); Rorie Sherman, *Homosexuals Struggle for Parental Rights*, NAT'L L.J., Nov. 30, 1987, at 3 (same). Some states do permit a lesbian co-parent to adopt her partner's biological child. See, e.g., *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993). Because the Massachusetts adoption statute does not expressly preclude joint adoption by two unmarried cohabitants, the court found the statute's primary purpose of advancing the best interests of the child served by allowing adoption of child by lesbian co-parents who both functioned as child's custodial and psychological parents. See *id.* at 319-20; see also *In re Charles B.*, 552 N.E.2d 884, 885-86 (Ohio 1990) (holding that gay foster parent was allowed to adopt child). But cf. *In re Opinion of the Justices*, 530 A.2d 21, 25-27 (N.H. 1987).

¹⁰⁴ I do not mean to imply that the inequality of marital and family relationships can have no bearing on understanding the genesis of violence in gay and lesbian relationships. Most gay and lesbian people grew up with heterosexual parents and this experience likely influences, at least in some way, their various perspectives on intimate relationships. But this argument requires more steps than have been made explicitly and, therefore, cannot be simply transposed from the context of violence in heterosexual relationships to violence in same-sex relationships.

¹⁰⁵ See Eaton, *supra* note 47, at 214.

¹⁰⁶ See Taub & Schneider, *supra* note 89; Schneider, *supra* note 89.

¹⁰⁷ 478 U.S. 186 (1986) (upholding constitutionality of Georgia sodomy statute).

¹⁰⁸ See *id.* at 195 (refusing to extend privacy doctrine to cover homosexual activity).

¹⁰⁹ See *id.* at 187-88.

¹¹⁰ See *id.* at 192-94.

¹¹¹ See Kendall Thomas, *Beyond The Privacy Principle*, 92 COLUM. L. REV. 1431, 1437-39 (1992) (describing police officers' campaign of harassment against Hardwick prior to arresting him).

In sum, one piece of the critique of feminist theoretical accounts is based on what they have concluded. The starring role in these accounts of the doctrines of marital property and family privacy, as they are implicated in heterosexual relationships, complicates the effort to understand intimate violence in gay and lesbian relationships.¹¹² Another piece of the critique, however, is based on what these accounts have excluded: They have failed to circumscribe the population upon whom the theories focus and to whom they refer.

Something subtle but profound is unintentionally accomplished when the reference group upon whom a theory is based, and to whom it applies, remains unstated. By describing a problem of intimate violence and theorizing its sources without circumscribing the boundaries of the group to whom the account refers, heterosexuality is reinforced as a superior status, a descriptor so powerful that it need not be stated. Whether labeled or unlabeled, this is the silent work of heterosexism.¹¹³

In such accounts, silence speaks approvingly of existing power imbalances. Homosexuality falls into the silences between things that matter enough to discuss. Its deviance is thereby recreated in the language not used. The problems that lesbians and gay men may experience in the current climate in speaking of their relationships, whether loving or abusive, are deepened. Silence and silencing are dynamically interrelated. In the context of intimate violence, silence can have dangerous implications.¹¹⁴

By multiplying the difficulties for lesbians or gay men to speak about what is already difficult to admit—that they have been abused by those they loved—the difficulties in coming to understand the source and nature of such abuse also are multiplied. Feminist theorists urge telling story after story after story as the predominant method of developing context, seeing patterns, and forging theories.¹¹⁵ It follows, then, that diminishing access to these stories diminishes understanding. Without well-developed knowledge of the problem, effective interventions are less easily achieved.¹¹⁶

¹¹² See *supra* notes 89-94 and accompanying text.

¹¹³ See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 195.

¹¹⁴ One study suggests that access to social and legal support services has contributed to a decline in partner-killings by heterosexual women. See Browne & Williams, *supra* note 3, at 91.

¹¹⁵ See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989); Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990); Symposium, *Pedagogy of Narrative*, 40 J. LEGAL EDUC. 1 (1990); Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727 (1990); Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA WOMEN'S L.J. 287 (1992) (book review).

¹¹⁶ See, e.g., Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 545 (1992) ("Without expanding our definitions of battering beyond the traditional heterosexual framework, effective ways of reaching out to and assisting battered lesbians and gay men in the community will be impossible.").

C. Gender Representations in the Discourse on Intimate Violence

Beyond this broad brush analysis of the predominant feminist theory that undergirds the discussion of intimate violence, it is useful to turn to some of the feminist literature on intimate violence for the representations of gender that it contains. While much of the feminist literature elaborates no underlying theory, it may be influenced by theoretical accounts elaborated elsewhere or by the sort of discourse that surrounds such accounts. In any event, whether as a consequence of the underlying theory or in conjunction with it, the dominant feminist literature of intimate violence appears to reflect and reinforce certain meanings of gender.

Del Martin's 1976 book, *Battered Wives*, is one of the first accounts of battering from an author who explicitly grounded herself in feminism.¹¹⁷ In the introduction of her 1988 anthology, *Feminist Perspectives on Wife Abuse*,¹¹⁸ Michele Bograd defines wife abuse as "the use of physical force by a man against his intimate cohabiting partner."¹¹⁹ Harkening back to Del Martin, the intimate cohabiting partner is always envisioned as a woman. Bograd indicates that these gender-specific terms and definitions are quite self-consciously chosen, since neutral terms would "obscure the dimensions of gender and power that are fundamental to understanding" the problem of battering.¹²⁰ The primary questions that feminist researchers, clinicians, and activists are said to address are: "Why do men beat their wives?" and "What function does this serve in our society?"¹²¹

The introduction to the anthology does occasionally circumscribe its focus, indicating that the chosen terminology directs attention to the violence in heterosexual relationships that are structured in certain culturally defined ways.¹²² The surprising use of the label "wife abuse," even for the battering of women by male partners who are not their husbands, is justified in the name of convenience.¹²³ Its use, however, must also be intended to support the claim that the historical inequities built into the institution of marriage have played a crucial role in supporting battering.¹²⁴ In the drafting process, the authors may have wavered on the wisdom of this underdescriptive label, for at one point the more inclusive alternative "woman abuse" appears in a

¹¹⁷ DEL MARTIN, *BATTERED WIVES* xvii (1976).

¹¹⁸ See FEMINIST PERSPECTIVES, *supra* note 1.

¹¹⁹ *Id.* at 12; see also MILDRED D. PAGELOW, WOMAN-BATTERING: VICTIMS AND THEIR EXPERIENCES 33 ("[B]attered women refers to adult women who were intentionally physically abused . . . by adult men with whom they have or had established relationships, usually involving sexual intimacy, whether or not within a legally married state."); WALKER, *supra* note 34, at xv ("Battered women include wives or women in any form of intimate relationships with men" who go through the battering cycle at least twice.); WALKER, *supra* note 46, at 203 ("A *battered woman* is a woman . . . who is or has been in an intimate relationship with a man who repeatedly subjects or subjected her to forceful physical and/or psychological abuse.").

¹²⁰ FEMINIST PERSPECTIVES, *supra* note 1, at 13.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 12-13.

¹²⁴ See *supra* notes 75-94 and accompanying text.

topic heading,¹²⁵ as if a global search to change every such designation omitted one instance of its use.

Despite the self-consciousness that the authors demonstrate in selecting names for complex social phenomena and the insights that are captured by the chosen terminology, there are costs to having selected the label "wife abuse" and defined it as stated above. One cost is that the book evinces no awareness of the existence of violence in same-sex relationships.¹²⁶ While never expressly indicating as much, the book implies that the problem of violence is confined to heterosexual relations or is specially situated in the marriage relationships from which same-sex partners are excluded. Abandoned in this way by erstwhile allies, victims of same-sex intimate violence are pushed even further from view.

An alternate term, chosen by Elizabeth Schneider,¹²⁷ is "woman abuse." This relinquishes the reference to the marriage relationship, thereby both losing something and gaining something. The allusion to a link between heterosexual battering and the historical incidents of marriage is lost, but

¹²⁵ See FEMINIST PERSPECTIVES, *supra* note 1, at 16.

¹²⁶ It could be argued that another cost is the lack of recognition of the problem of men who are battered by women. Some studies have reported a discernible problem of female-on-male intimate violence. See MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 38, 40-41 (1980); Murray A. Straus & Richard J. Gelles, *Societal Change and Change in Family Violence from 1975 to 1985 as Revealed by Two National Surveys*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES 113, 119-20 (Murray A. Straus & Richard J. Gelles eds., 1990); Suzanne K. Steinmetz, *The Battered Husband Syndrome*, 2 VICTIMOLOGY 499, 499-509 (1977-78); Murray A. Straus, *Physical Violence in American Families: Incidence Rates, Causes, and Trends*, in ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE 17, 17 (Dean D. Knudsen & JoAnn L. Miller eds., 1991). These studies have been discredited, however, for their failure to take account of the context of intimate violence and the self-defensive nature of most of women's violence against men. See SCHECHTER, *supra* note 66, at 209-16; Michele Bograd, *Family Systems Approaches to Wife Battering: A Feminist Critique*, 54 AM. J. ORTHOPSYCHIATRY 558, 558-68 (1984); Elizabeth Pleck et al., *The Battered Data Syndrome: A Comment on Steinmetz' Article*, 2 VICTIMOLOGY 680, 680-83 (1977-78); see also *New Findings on Vicious Wife Beaters*, USA TODAY, Aug. 27, 1993, at 4D (reporting that a recent study found no female battering of men).

Even if there are numerous instances of female-on-male violence, this does not mean that intimate violence has equally deleterious consequences for men and women. See Straus & Gelles, *supra*, at 120; see also Margaret Howard, *Husband-Wife Homicide: An Essay from a Family Law Perspective*, 49 LAW & CONTEMP. PROBS. 63, 70 n.40 (Winter 1986) (reporting studies that show more frequent and serious injuries of female victims of male partners compared to male victims of female partners). In a society that socializes male aggression and female inferiority, it would not be surprising to find, as does most of the evidence, that violence in heterosexual relationships runs primarily in one direction. Male-on-female violence is consistent with socialization, whereas female-on-male violence counters socialization.

Although contrary to the system of gender subordination, some heterosexual partnerships may contain female-on-male battering. The victims of such battering are entitled to support and relief. Although the primary concern of this Article is the way that the gender-specificity of the conversation on intimate violence excludes a documented problem of same-sex intimate violence, some of the suggestions for challenging the exclusive gendered imagery of the dominant understanding of the problem may indirectly benefit the male victim of female violence, if he exists. Should sound evidence ever establish a social problem of female-on-male violence, remedies aimed directly at that problem can then be crafted. Currently, little such evidence exists.

¹²⁷ See Schneider, *supra* note 116, at 520.

inclusiveness is gained by discarding the seeming limitation to married couples.¹²⁸ "Woman abuse" may also be read to include women who are abused by female partners,¹²⁹ although it excludes the problem of intimate violence in gay male relationships.

The expressions "battered woman" and "battered woman syndrome," like the expressions "woman battering" and "woman abuse," may be read broadly enough to include women who are abused by female partners, because only the gender of the abused is specified, not the gender of the abuser. On the other hand, it is possible that the woman of "battered woman" and "battered woman syndrome" is so identified as the victim of male battering that she has come to be associated exclusively with the abused. Consequently, when a woman reveals that she has suffered intimate violence at the hands of a woman, it may be difficult for the listener to surmount the entrenched gender imagery that links victimization with femaleness to conjure up a new image of woman as abuser.

Perhaps this is one explanation for why a trial court in a 1990 murder case, *State v. Green*,¹³⁰ involving a battered lesbian who claimed self-defense, translated the term "battered woman syndrome" into "battered person syndrome."¹³¹ Even though the defendant was, in fact, a battered woman, the court found this gender specificity confusing when the batterer was also a woman. Thus, the judges chose to elide the complexity of the gender issue by converting to gender-neutral terminology.¹³²

The difficulty that the culture and the courts have in imagining "woman-as-abuser" impairs the perceived credibility of the lesbian victim of intimate violence. Insufficient credibility may have severe material consequences. The claims made by one woman to fear the violence of another woman may go unheeded, and she may be denied the help she needs to escape or survive her traumatic circumstances. If she has assaulted her female partner to save herself, her assertion of self-defense may be wrongfully denied, leading to a criminal conviction and the possible loss of liberty through state-imposed sanctions such as incarceration. In short, a lesbian's insufficient credibility in such circumstances predictably contributes to her incapacitation, either through imprisonment, injury, or death.

¹²⁸ See *supra* note 119 and accompanying text.

¹²⁹ Other authors define "battered woman" without reference to the gender of the partner. See, e.g., Mary A. Douglas, *The Battered Woman Syndrome*, in *DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE* 39 (Daniel J. Sonkin ed., 1987) ("A battered woman is any woman who has been the victim of physical, sexual, and/or psychological abuse by her partner.").

¹³⁰ For a discussion of the lower court's unpublished opinion in *Green v. State*, 575 So. 2d 796 (Fla. Dist. Ct. App. 1991), see Robson, *supra* note 37, at 574-75.

¹³¹ See Robson, *supra* note 37, at 574-75 (citing telephone conversation with Green's trial attorney).

¹³² Another interpretation of this change in language is that the recognition of a woman as an abuser revealed the wisdom of unsettling gender norms more generally. Under this interpretation complexity is not elided; rather, it is respected. Given other features of the *Green* case, in which homophobic attitudes exhibited by jurors were ignored by the judge, see *id.* at 575, the interpretation offered in the text seems the more convincing of the two. Yet another interpretation is offered at notes 151-152 *infra* and accompanying text.

Commentators have noted that the recognized packaging within our legal system of a self-defense claim arising from a battering relationship separates "good" battered women from "bad" battered women.¹³³ As Michael Dowd observes: "'Good' battered women are passive, loyal housewives acting as loving companions to their abusers. These women have flawless characters and continually appeal to the police and courts for help, regardless of the futility of their efforts"¹³⁴ Dowd concludes that "the frontal assault on battered women as a whole has been replaced by the individual disqualification of certain women from the group."¹³⁵

The narrowness of the ideal of "good" battered women assures that exclusion of women from this select group will be more the rule than the exception. Not surprisingly, the good battered woman is nothing more than a good woman, defined in traditional Victorian terms. The underlying ideal reflects an underlying ideology.

The ideology of gender has long suggested that to be a timid, delicate, passive, demure, docile, deferential, and nurturing caretaker is to be a woman worthy of the love and protection of men.¹³⁶ The unattainability of the ideal contributes to its effectiveness as a social control mechanism. It is women's inability to live up to the ideal that disqualifies them from entitlement to male protection, supports the violence perpetrated against them, and contributes to women's views that they are to blame for violence against them.

Feminist activists may have succeeded in putting domestic violence on the mainstream social agenda only to the extent that it cultivates traditional gender imagery of men as aggressive actors and women as passive victims in need of the surrogate male protection of the state.¹³⁷ Just as the civil rights movement required American culture to denounce the violence of *de jure* segregation as a means of enforcing race ideology, so too the women's movement has required society to denounce "private" violence as a means of enforcing gender ideology.¹³⁸ By removing the official public imprimatur from

¹³³ See sources cited *supra* note 24.

¹³⁴ Dowd, *supra* note 24, at 581; cf. Crocker, *supra* note 24, at 144 ("[A] defendant may be considered a battered woman only if she never left her husband, never sought assistance, and never fought back.").

¹³⁵ Dowd, *supra* note 24, at 581.

¹³⁶ See sources cited *supra* note 84.

¹³⁷ For sustained development of the notion of the surrogate maleness of the state, see CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 162 (1989); see also Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. OF WOMEN IN CULTURE AND SOC'Y 635, 644 (1983) ("I propose that the state is male in the feminist sense. The law sees and treats women the way men see and treat women.").

¹³⁸ Feminist scholars have demonstrated that labeling intimate violence as "private" is part of the problem of intimate violence. Such labeling masks awareness that intimate violence is also socially and politically structured and susceptible to institutional prevention and intervention. See GORDON, *supra* note 93, at 3, 251 ("Family violence has been historically and politically constructed . . . [b]attering behavior is also socially determined."); Schneider, *supra* note 89, at 985 ("[F]ailure to respond [to problems of battered women] is an affirmative political decision that has serious public consequences. The rationale of privacy masks the political nature of the decision. Privacy thus plays a particularly subtle and pernicious ideological role in supporting, encouraging, and legitimating violence against women."); see also Martha Minow, *Words and the*

both race and gender ideology, however, American culture gained legitimacy while leaving the underlying ideologies to flourish.

Although the American mainstream no longer officially approves of private violence as the mechanism for enforcement of gender ideology, in many ways it still insists on the ideology itself. This insistence on understanding gender dichotomously as a collection of particular male characteristics versus particular female characteristics has stymied women's equality in a number of arenas, including self-defense.¹³⁹ Almost by definition, an act of self-defense represents a failure to live up to idealized female gender norms.¹⁴⁰

The reasons for legal success in gaining the in-court admissibility of battered woman syndrome, understood as a partial description of the consequences of battering that may lead to an act of self-defense,¹⁴¹ are sharpened in this light. Battered woman syndrome incorporates several of the most entrenched female stereotypes.¹⁴² If a battered woman is deemed to be adequately portrayed by the commonly (mis)perceived attributes of battered woman syndrome—passive, dependent, weak, helpless, submissive¹⁴³—and if her act of self-defense can be understood as an instinctive survival reaction to the sudden escalation of her batterer's violence,¹⁴⁴ then she may be adjudicated to have acted in self-defense. Her defense prevails not through a deep appreciation of her experiences living under the threat of violence in the supposed safety of her home, but through the perception that she is a *bona fide*

Door to the Land of Change: Law, Language, and Family Violence, 43 VAND. L. REV. 1665, 1671-72 (1990) (public failure to respond to needs of battered women is part of the violence they suffer).

¹³⁹ This understanding of gender animates the separate spheres ideology, see sources cited *supra* note 80, and is responsible for occupational segregation and the difficulties women face in employment. See *supra* notes 86-88 and accompanying text.

¹⁴⁰ See Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 561 (1988) (violence inflicted by a battered woman is "antithetical to traditional concepts of 'feminine'").

¹⁴¹ See Schneider, *supra* note 24, at 198 ("Expert testimony on battered woman syndrome was developed to explain the common experiences of, and the impact of repeated abuse on, battered women. The goal was to assist the jury and the court in fairly evaluating the reasonableness of the battered woman's action . . . where the testimony was proffered as relevant to self-defense.").

¹⁴² See Allard, *supra* note 24, at 196; Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 5 (1994) (claiming that battered woman syndrome reinforces negative stereotypes of women); see also Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence and Agency*, in PUBLIC NATURE OF PRIVATE VIOLENCE, *supra* note 47, at 59, 63 (asserting that stereotypes of battered women as helpless, dependent, and pathological depend on the fiction that violence is exceptional).

¹⁴³ As Schneider observes:

[A]lthough the rationale for admission of expert testimony on battered woman syndrome was to counteract stereotypes of battered women as solely responsible for the violence, testimony is being presented, heard and sometimes misheard, that goes to the other extreme of depicting battered women as helpless victims and failing to describe the complexity and reasonableness of why battered women act. . . . Indeed, the overall impact of the battered woman syndrome stereotype may be to limit rather than expand the legal options of women who cannot conform to these stereotypes.

Schneider, *supra* note 24, at 199.

¹⁴⁴ See Dowd, *supra* note 24, at 574.

woman. That is, despite her violent response to her batterer, she convinces the factfinder that she conforms to the requisite gender norms.

This is a narrow window of hope for vindication. The obstacles faced by any actual woman, replete with the flaws and complexities of real human beings, in convincing decisionmakers that her life and her actions fall within the pinched boundaries of battered woman syndrome are high if not insurmountable.¹⁴⁵ As a result, appellate victories regarding the admissibility of battered woman syndrome may promise more than they can typically deliver at the trial level.¹⁴⁶ Despite the legal recognition of battered woman syndrome, our society actually recognizes very few nonhypothetical, flesh-and-blood women to exhibit it.¹⁴⁷

Consider now the plight of a woman who has killed her female lover in self-defense. In a legal regime that recognizes self-defense only when it appears in tandem with conformity to narrow gender stereotypes, how can she possibly prevail? Her identity, in and of itself, departs from such stereotypes, because one cultural requirement of any true woman is that her attentions and affections are turned toward, and responsive to, men.¹⁴⁸ Lesbians are

¹⁴⁵ See, e.g., *People v. Ciervo*, 506 N.Y.S.2d 462, 464 (N.Y. App. Div. 1986) (state challenged defendant's claim of suffering from battered woman's syndrome by alleging that defendant was an adulteress, a drug user, a neglectful mother, and a poor housekeeper and that she therefore provoked the violence).

¹⁴⁶ The following cases state that evidence of battered woman's syndrome is admissible in appropriate circumstances. See, e.g., *People v. Aris*, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989); *Ibn-Tamas v. United States*, 455 A.2d 893 (D.C. 1983); *Terry v. State*, 467 So. 2d 761 (Fla. Dist. Ct. App. 1985); *Borders v. State*, 433 So. 2d 1325 (Fla. Dist. Ct. App. 1983); *Strong v. State*, 307 S.E.2d 912 (Ga. 1983); *Smith v. State*, 277 S.E.2d 678 (Ga. 1981); *People v. Gindorf*, 512 N.E.2d 770 (Ill. App. Ct. 1987), *cert. denied*, 486 U.S. 1011 (1988); *People v. Minnis*, 455 N.E.2d 209 (Ill. App. Ct. 1983); *State v. Stewart*, 763 P.2d 572 (Kan. 1988); *State v. Hundley*, 693 P.2d 475 (Kan. 1985); *State v. Anaya*, 438 A.2d 892 (Me. 1981); *State v. Hennum*, 441 N.W.2d 793 (Minn. 1989); *State v. Williams*, 787 S.W.2d 308 (Mo. Ct. App. 1990); *State v. Baker*, 424 A.2d 171 (N.H. 1980); *State v. Kelly*, 478 A.2d 364 (N.J. 1984); *State v. Gallegos*, 719 P.2d 1268 (N.M. Ct. App. 1986); *State v. Branchal*, 684 P.2d 1163 (N.M. Ct. App. 1984); *People v. Torres*, 488 N.Y.S.2d 358 (N.Y. Sup. Ct. 1985); *State v. Norman*, 378 S.E.2d 8 (N.C. 1989); *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983); *State v. Hill*, 339 S.E.2d 121 (S.C. 1986); *State v. Ciskie*, 751 P.2d 1165 (Wash. 1988); *State v. Allery*, 682 P.2d 312 (Wash. 1984) (en banc); *State v. Steele*, 359 S.E.2d 558 (W. Va. 1987); *State v. Felton*, 329 N.W.2d 161 (Wis. 1983).

Not all of the appellate courts that have considered the issue have ruled that evidence of battered woman syndrome is admissible. See *Mullis v. State*, 282 S.E.2d 334, 337 (Ga. 1981); *People v. White*, 414 N.E.2d 196, 200 (Ill. App. Ct. 1980); *Fultz v. State*, 439 N.E.2d 659, 662 (Ind. Ct. App. 1982); *State v. Necaise*, 466 So. 2d 660, 665 (La. Ct. App. 1985); *State v. Edwards*, 420 So. 2d 663, 677-78 (La. Ct. App. 1982); *State v. Martin*, 666 S.W.2d 895, 900 n.2 (Mo. Ct. App. 1984); *State v. Dannels*, 734 P.2d 188, 192-93 (Mont. 1987); *State v. Moore*, 695 P.2d 985, 987 (Or. Ct. App. 1985); *Buhrle v. State*, 627 P.2d 1374, 1376 (Wyo. 1981).

¹⁴⁷ The experience of the Framingham Eight clemency cases supports this proposition. When prosecutors and decedents' family members opposed clemency they typically asserted their awareness of, and concern for, the problem of intimate violence, but indicated that, as they viewed the evidence, the petitioner was not a battered woman and was falsely claiming to have suffered from battered woman syndrome. For further discussion of this point, see McMorrow, *supra* note 15, at 226.

¹⁴⁸ For example, the term "mother" is defined in relation to men. We modify mother to say "single mother," but it is considered redundant to say "married mother." The default assumption is that "mothers" are married to men. See Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 291.

not regarded as the appropriate beneficiaries of the state's (i.e., men's) chivalric protection.¹⁴⁹ Moreover, independent of the facts and circumstances of a particular case, the dominant cultural imagery of lesbians as aggressive, masculine, angry, and disturbed persons tends to place them outside the normative understanding of womanhood and, therefore, outside the group described by "battered woman" or "battered woman syndrome."¹⁵⁰

This, of course, is an alternate explanation for the Florida trial court's linguistic conversion from "battered woman syndrome" to "battered person syndrome" in the context of a battered lesbian.¹⁵¹ The *Green* court did not see Annette Green as a real woman. Although the prosecutor acknowledged that her partner had battered and shot at her in the past, Green's assertion of self-defense was unsuccessful.¹⁵² A lesbian, perceived as lacking the traditional attributes of a good Victorian woman, is not likely to prevail when asserting self-defense.

A battered gay man may be even more disadvantaged. While the law has typically portrayed self-defense as arising between two men,¹⁵³ these paradigmatic individuals have not been gay men involved in an intimate relationship. The dynamics of the traditional self-defense confrontation are not the prolonged cyclical dynamics of relationships marred by repeated violence.¹⁵⁴ Even more problematically, both the domestic violence movement and the law envision the abused partner to be female.¹⁵⁵ A gay male victim

¹⁴⁹ See *supra* note 23 and accompanying text; see also Mahoney, *supra* note 24, at 13 (stating that "clinical and criminal justice responses to battering [blaming women for their abuse and denying or trivializing the violence] are revealed as ideological in the light of their collusion with batterers' rationalizations.") (quoting Ptacek, *supra* note 1, at 133, 155).

¹⁵⁰ See Herek, *supra* note 36 (discussing popular stereotypes of lesbians and gay men).

¹⁵¹ See *supra* notes 130-132 and accompanying text.

¹⁵² See Robson, *supra* note 37, at 575.

¹⁵³ See, e.g., GILLESPIE, *supra* note 34, at 4 ("The law of self-defense is a law for men.").

¹⁵⁴ Commentators assert that the paradigm of self-defense is a male fight—a single, discrete encounter between physical equals. Thus, the objective standard of reasonableness in self-defense law cannot apply fairly to a woman in a long-term battering relationship. See, e.g., Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227, 230 (1986) (stating that "[u]nfortunately for battered women, 'classic' self-defensive action is embodied in male, stranger-to-stranger assault"); Walter W. Steele, Jr. & Christine W. Sigman, *Reexamining the Doctrine of Self-Defense to Accommodate Battered Women*, 18 AM. J. CRIM. L. 169, 175-80 (1991) (stating that rules of self-defense, including imminence and proportionality, assume a confrontation between two equal male aggressors); see also Laura E. Reece, *Women's Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA WOMEN'S L.J. 53, 55 (1991) (explaining that "[t]he criminal law traditionally discounts the perspective of women, not only in application, but also in development[,] in part because of the predominance of men in the criminal homicide population and in part because of the predominance of men in constructing the law).

Another commentator suggests that the gender bias found in the law of self-defense is not inherent in the law itself but in judges' biased interpretations of the law. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 437 (1991). Rather than suggesting a change in the substantive law of self-defense, Maguigan urges change in procedural rules that affect the standards by which judges assess defense evidence for purposes of admitting expert testimony and granting jury instructions on self-defense. See *id.* at 457-59.

¹⁵⁵ See *supra* notes 117-121 and accompanying text; see, e.g., Mather, *supra* note 140; M.J.

of a violent partner is not a battered woman, much less a good battered woman. Hence, the legal system, preprogrammed with the gendered imagery of the language of domestic violence, will have difficulty adjudging his self-defensive conduct as reasonable.

The legal difficulties faced by lesbians and gay men who raise self-defense claims in an intimate violence context are exacerbated by statutes that often do not recognize the possibility of same-sex intimate violence. In some states the statutory definitions of domestic violence, like the domestic violence literature, are gender-specific or status-specific. These definitions refer to the problem as one between male batterers and female victims, people of the opposite sex, spouses, or relatives.¹⁵⁶ Consequently, many avenues of legal redress open to heterosexual victims in these jurisdictions—most significantly, civil restraining orders or orders of protection and safe space in state-funded shelters—appear to be unavailable to abused lesbians and gay men.¹⁵⁷

Diminished access to legal relief might work logically to increase the persuasive power of a self-defense claim in a case of same-sex violence. With even fewer authorized avenues of redress available, the argument would run, self-defensive acts become more necessary more quickly for a gay or lesbian claimant than for a heterosexual woman.¹⁵⁸ Unfortunately, the evidence points to a contrary result.¹⁵⁹ The more limited statutory remedies for same-sex abuse victims illuminate how entrenched in heterosexual images the concept of intimate violence remains. This imagery renders the violent acts of abused lesbians and gay men attempting to save their own lives virtually incomprehensible as self-defense.

The failure of both the legal system and the dominant domestic violence literature to consider the problem of intimate violence in gay and lesbian relationships illustrates the power of what Leigh Leonard calls “the heterosexual presumption.”¹⁶⁰ Implicit in this presumption is the notion that everyone affected by an issue is heterosexual, or if lesbians or gay men are affected, it is “in situations essentially similar to those of heterosexual women so that no specific consideration is warranted.”¹⁶¹ In the context of intimate violence, the source of this presumption is not only the myopia of heterosexuals. Until recently, gay and lesbian communities also have been complicit in

Willoughby, *Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?*, 38 KAN. L. REV. 169 (1989).

¹⁵⁶ See *supra* note 62 and accompanying text.

¹⁵⁷ Even if such services are theoretically available to gay men and lesbians, they may be practically unavailable due to less-than-hospitable treatment by service providers. See *supra* note 60 and accompanying text.

¹⁵⁸ See Browne & Williams, *supra* note 3 (linking a recent decline in women's killings of intimates to a recent increase in domestic violence resources).

¹⁵⁹ Defendants charged with killing a same-sex batterer have not fared well at the trial level. See *Green v. State*, 575 So. 2d 796, 796 (Fla. Dist. Ct. App. 1991); *Bristow v. State*, 338 So. 2d 553 (Fla. Dist. Ct. App. 1976); *Crawford v. State*, 404 A.2d 244 (Md. 1979); .

¹⁶⁰ Leigh M. Leonard, *A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption*, 12 WOMEN'S RTS. L. REP. 39, 39-40 (1990).

¹⁶¹ See *id.* at 40.

suppressing awareness of same-sex intimate violence.¹⁶² Now that gays and lesbians have begun to speak of these issues,¹⁶³ and cases of same-sex intimate violence have appeared in official case reports,¹⁶⁴ the dominant resistance discourse must incorporate understandings of this phenomenon for its theory and practice to be broad-based, inclusive, effective, and accurate.

D. Representations of Same-Sex Intimate Violence

Intimate violence among lesbians and gay men is not entirely invisible within the leading legal scholarship about intimate violence. One can find a few references to, and some truncated analysis of, violence in same-sex relationships. Nonetheless, when the literature of intimate violence has revealed awareness of the existence of gay and lesbian relationships, it has often done so in a problematic manner.

1. Littleton

Christine Littleton has written that the phenomenon of intralesbian battering shows "not that battering is non-sexual, but rather that sexual roles are non-biological."¹⁶⁵ She indicates that she employs male pronouns for abusers and female pronouns for the abused, "not only because that is the more frequent configuration, but because battering is a *socially* male activity, as are rape and warfare, even though occasionally practiced by biological females."¹⁶⁶ Consequently, she examines the reasons that women may stay in relationships with abusive men, but ignores the reasons they may stay in relationships with abusive women.¹⁶⁷ Her thesis—that battering is a feature of social maleness—is stated but not explored.¹⁶⁸ Littleton's account is weakened by omitting the life experiences of battered lesbians. In Leonard's words, "If the focus of the study is women who are battered, then the experiences of lesbians are relevant and possibly essential in understanding the dynamics of battering relationships."¹⁶⁹

Ruthann Robson suggests that theories of battering that depend on a dominance/submission dynamic rooted in stereotypical gender roles may not apply to lesbian relationships.¹⁷⁰ She counsels resistance to "hetero-relationalizing" lesbian relationships.¹⁷¹ This phenomenon occurs when one analogizes lesbian relationships to traditional heterosexual gender roles.¹⁷² Robson as-

¹⁶² See *supra* note 37 and accompanying text.

¹⁶³ See ISLAND & LETELLIER, *supra* note 32; NAMING THE VIOLENCE, *supra* note 32; see also Lundy, *supra* note 22, at 308-09 (describing strides in the gay and lesbian community to acknowledge publicly the problem of same-sex intimate violence).

¹⁶⁴ See *supra* note 159; see also *People v. Spencer*, 458 P.2d 43 (Cal. App. Dep't Super. Ct. 1969) (en banc); *People v. Huber*, 475 N.E.2d 599 (Ill. App. Ct. 1985).

¹⁶⁵ See Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 28 n.20.

¹⁶⁶ *Id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See Leonard, *supra* note 160, at 49.

¹⁷⁰ See Robson, *supra* note 37, at 574.

¹⁷¹ See *id.* at 572.

¹⁷² See *id.*

serts that viewing a lesbian batterer as simply a surrogate man, as Littleton does, serves to negate and distort lesbian lives.¹⁷³

At the end of her article, Littleton suggests that a partial remedy for intimate violence may lie in the expansion of woman-centered communities, including the legalization of lesbian marriage.¹⁷⁴ Littleton asserts that greater access to these options would offer women the opportunity to find happiness in relationships and networks with other women as an alternative to heterosexual relationships that contain greater risk of violence.¹⁷⁵ While these statements are certainly inclusive of lesbian lives, they also reveal a marked skepticism about the possibility of violence in lesbian relationships. For reasons stated previously,¹⁷⁶ the limitations on our knowledge about the prevalence of same-sex intimate violence make it difficult to gauge accurately the relative safety of same-sex relationships.

2. Schneider

In her recent article *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*,¹⁷⁷ Elizabeth Schneider raises and describes the issue of battering in gay and lesbian relationships, suggesting that an awareness of the issue, among others, "compels an expansion of the traditional concept of battering . . ."¹⁷⁸ She prods those involved in the battered woman's movement to confront the conceptual challenge posed by violence in same-sex relationships.¹⁷⁹ Schneider asks authors and advocates to reexamine and rethink their assumptions about battering, forging a link between the particularity of the full range of experiences with battering and more general insights about these sorts of experiences.¹⁸⁰

Particularity and Generality provides important recognition from an important scholar and activist in the field, heightening the visibility of the issue of same-sex intimate violence. The article is preliminary and prescriptive, identifying many issues while intentionally leaving the development of these issues to future scholars.¹⁸¹ Valuable next steps in this scholarly progression include: recognition of the exclusionary impact that the dominant intimate violence discourse has on battered gay men and lesbians, a description of the effect of this exclusion on access to aid by battered gays and lesbians, and a more inclusive reformulation of some of the primary concepts embedded in current thinking on intimate violence.

While Schneider observes that battering is not unique to male/female relations,¹⁸² her article also exemplifies the strength of the dominant paradigm of battering. At some points, Schneider articulates the importance of

¹⁷³ *Id.* at 590-91.

¹⁷⁴ See Littleton, *supra* note 165, at 55.

¹⁷⁵ *Id.*

¹⁷⁶ See *supra* notes 32-38 and accompanying text.

¹⁷⁷ See Schneider, *supra* note 116.

¹⁷⁸ *Id.* at 543.

¹⁷⁹ *Id.* at 541-45.

¹⁸⁰ *Id.* at 527.

¹⁸¹ *Id.* at 568 ("[T]his discussion of the issue . . . is preliminary.").

¹⁸² See *id.* at 543.

expanding definitions of battering beyond the traditional heterosexual framework,¹⁸³ while at other points she describes her article as examining issues posed by male battering of women.¹⁸⁴ In and of itself, this confusion illustrates the difficulty posed by a dominant discourse.¹⁸⁵ Even a significant article calling for incorporation of gay and lesbian relationships into our thinking about intimate violence fails to retool the language typically used for such situations in order to achieve its aims.

Particularity and Generality contains another oversight. Its introduction states: "This Article underscores the need to look at women's real life situations in context, while holding on to both particularity—the particular experiences of women who are battered by men—and generality, broader understandings of the problem of violence and gender."¹⁸⁶ Contrary to the section entitled "Lesbian and Gay Male Battering,"¹⁸⁷ this passage excludes same-sex intimate violence from the topic that requires particularity, relegating it to the general, the way that the real problem of intimate violence—male battering of women—generalizes into other violent contexts. But no one can ascertain the form that these generalizations will take until knowledge of same-sex intimate violence is more richly particular. Schneider knows this, of course; she cites the need for greater understanding of the experiences of lesbian and gay male abuse at other points in her article.¹⁸⁸ Again, however, the dominant domestic violence discourse seems to block sustained expression of this knowledge.

Several passages in *Particularity and Generality* lend themselves to elaborating an analysis of the meaning and effect of the exclusion of gays and lesbians from the domestic violence literature. When discussing the legal dilemmas of mothers who are battered, for example, Schneider cites to scholarship about the disadvantages in custody decisions faced by women who deviate from traditional motherly stereotypes.¹⁸⁹ A lesbian, one of the examples she draws on, is not considered a perfect mother.¹⁹⁰ Once Schneider

¹⁸³ *Id.* at 545.

¹⁸⁴ See *id.* at 528-29 ("Through a detailed examination of issues posed by male battering of women, this Article demonstrates the need for feminist theory to address both particularity and generality."); *id.* at 529 ("This Part explores the theoretical and strategic implications of choices in naming the problem of male battering of women."). The Part to which Schneider refers includes the section on "Lesbian and Gay Male Battering."

¹⁸⁵ For another perspective on the power of a dominant discourse to influence reality, see Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 730 (1988). For a particularly acute example of the intransigence of the dominant discourse, despite contrary data, in the intimate violence context, see Lundy, *supra* note 22, at 301 n.162 (describing Boston television news program that identified the Framingham Eight as including a battered lesbian, then stated shortly thereafter that the Framingham Eight were women "abused by men").

¹⁸⁶ Schneider, *supra* note 116, at 527.

¹⁸⁷ *Id.* at 542-45.

¹⁸⁸ *Id.* at 545 ("Understanding the experiences of lesbian and gay male abuse is an important first step toward a comprehensive redefinition of battering relationships."); *id.* at 528 ("[F]ocus only on particularity and failure to make the conceptual link to generality limits the development of a richer and more textured feminist theory and practice.").

¹⁸⁹ *Id.* at 556.

¹⁹⁰ *Id.*

identifies a cultural perception that lesbians fail to meet the traditional gender role norms of motherhood, this insight could inform her subsequent discussion of the persistence of female gender stereotypes in battered women's self-defense cases. Just as lesbians are not seen as conforming to the gender stereotype of the perfect mother, they are also not seen as conforming to the gender stereotype that Schneider describes for the perfect battered woman.¹⁹¹ This kind of conceptual connection might then have begun a discussion of the discursive changes that could promote greater chances of fairness in the legal arena for lesbians and other battering victims who do not conform, in the eyes of mainstream culture, to conventional gender stereotypes.

Once again, the battering victim who least conforms to gender stereotypes is the battered gay man.¹⁹² Although Schneider mentions his plight,¹⁹³ she inadvertently reinforces it within the article by retaining from beginning to end the language of "woman-abuse."¹⁹⁴ For the most part, her section on lesbian and gay male battering focuses on lesbians.¹⁹⁵ This is likely, in part, because lesbians do not depart as obviously from the woman-abuse terminology and, in part, because the lesbian community has generated relatively more literature on battering than has the gay male community.¹⁹⁶ As a result, *Particularity and Generality* simultaneously provides and submerges recognition of battering in gay male relationships.

3. Mahoney

In *Legal Images of Battered Woman: Redefining the Issue of Separation*,¹⁹⁷ Martha Mahoney does not purport to recognize intimate violence in gay male relationships. Her focus is explicitly on battered women,¹⁹⁸ including battered lesbians to some degree.¹⁹⁹ While Mahoney always specifies the

¹⁹¹ *Id.* at 563 ("Women are seen [by jurors in cases of battered women's self-defense] as too strong, assertive, or 'together' to fit the definition of victim . . ."); *id.* at 561 ("[Battered women's self-defense cases] revealed the tenacity of sex-stereotyping for, despite the purpose for which this legal strategy was conceived, old stereotypes of incapacity were replicated in a new form.").

¹⁹² See *supra* notes 153-155 and accompanying text.

¹⁹³ Schneider, *supra* note 116, at 542 ("[T]he acknowledgment of . . . gay male . . . abuse affects definitions of battering in theory and in practice."); *id.* at 545 ("Understanding the experiences of . . . gay male abuse is an important first-step . . .").

¹⁹⁴ *Id.* at 526 ("We must develop legal theory and practice that are accurate to the realities of women's experiences . . ."); *id.* at 529 (Although Part I includes acknowledgement of the problem of gay male abuse, Schneider states in the introduction that "Parts I and II illuminate the need for women's experiences of battering to be described with particularity. . ."); *id.* at 567 ("[W]e must rethink . . . assumptions . . . in order to grapple with new and hard problems—the experience of lesbian-battering, elder-abuse, the problems of battered women with abused children, and the complex experiences that battered women have as mothers."); *id.* at 568 ("We must hold on to both particularity (the particular experiences of women who have had relationships with battering men) and generality (violence and power and control, reasonableness and the larger struggle of women in the world) simultaneously.").

¹⁹⁵ *Id.* at 542-45.

¹⁹⁶ *Id.* at 542.

¹⁹⁷ See Mahoney, *supra* note 24.

¹⁹⁸ See *id.* at 2 ("I am writing about women's lives.").

¹⁹⁹ *Id.* at 49-53 (section titled, "Lesbian Battering: Defining a Problem Outside the Legal System").

gender of the abused as female, her language for the abuser—the “abuser,” the “abusive partner,” the “batterer,” the “violent partner”—tends to focus on behavior, not gender.²⁰⁰

Gender identification of the batterer creeps in when Mahoney examines domestic violence literature, legal cases, and particular stories.²⁰¹ Although the stories, the cases, and some of the research samples cited in the literature are of people who have particular genders, the domestic violence literature and the legal analyses in the cases often speak of problems in gendered terms when they intend to speak in general terms.²⁰² These descriptions provide further evidence of the grip of heterosexual imagery on the definition of the underlying problem.

Mahoney tries to loosen this grip. She considers first-person narratives by battered lesbians and battered heterosexual women, crediting the contribution to her thinking made by the narratives of battered lesbians.²⁰³ Lesbian narratives of battering, she observes, are less distorted by stereotype and strategy than are heterosexual women’s narratives, because they have developed largely outside of legal and cultural institutions.²⁰⁴ Consequently, in many instances lesbian narratives provide a more nuanced, sophisticated, and accurate account of the complex experience of a battering relationship than do the narratives of heterosexual violence.²⁰⁵

Legal Images of Battered Women focuses on issues of language, on reshaping cultural perceptions by choosing words carefully.²⁰⁶ Mahoney’s language for batterers becomes deliberately gender-specific, invoking imagery of violent marriages and abusive husbands or boyfriends, in the section entitled, “Live Women and Dead Men: The Self-Defense Cases.”²⁰⁷ The cases

²⁰⁰ *Id.* at 5 (“[T]he batterer’s quest for control of the woman.”) (emphasis omitted); *id.* at 25 (“Women resist applying the term ‘battered woman’ to ourselves . . . even when we seek temporary restraining orders against our abusers”); *id.* at 27 (“Most of the early studies focused on the psychopathology of the female victims . . . such approaches tended to reinforce batterers’ defenses and denial”); *id.* at 40 (“[W]omen must prove helplessness in court after they have killed an abusive partner”); *id.* at 43 (“Evidence suggests that the batterer’s behavior, rather than the battered woman’s characteristics, determines her response”); *id.* at 53 (“an effort by the batterer to control the woman who is the recipient of the violence”); *id.* at 63 (“[W]e ask the woman herself about . . . the violent partner whose behavior actually defines her states as a ‘battered woman.’”).

²⁰¹ *Id.* at 15-18, 20-21, 59, 62-63, 66-68 (stories); *id.* at 27-29, 31-34, 54-58 (domestic violence literature); *id.* at 37, 72-79, 82, 84-92 (cases).

²⁰² See *supra* note 119 and accompanying text.

²⁰³ See Mahoney, *supra* note 24, at 9 (stating that lesbian narratives provide “one clue to the question ‘[W]hat would this . . . landscape look like if women had constructed it for ourselves?’”) (quoting Littleton, *supra* note 165, at 30).

²⁰⁴ See *id.* at 52-53 (suggesting that societal exclusion of lesbians has helped lesbian narratives retain a “more nuanced, less stereotyping, and less victim-blaming view than any other literature in the field”).

²⁰⁵ See *id.*

²⁰⁶ *Id.* at 10 (“I demonstrate how naming separation assault can intervene in the interrelationship between law and culture in the field of domestic violence to change both the questions asked and the answers found by courts in several areas of law.”); *id.* at 71 (explaining that naming separation assault “can help change legal doctrine in several areas by shifting both cultural expectation and judicial inquiry”).

²⁰⁷ *Id.* at 79-93.

she examines do concern violent heterosexual relationships—in fact, all of them are marriages²⁰⁸—but Mahoney's gender specificity at this juncture is troubling. In an earlier section, Mahoney claims a "virtual absence of self-defense killings in lesbian relationships,"²⁰⁹ but in a footnote she cites to the case of Annette Green, a battered lesbian, convicted in Florida of first-degree murder for the death of her violent partner.²¹⁰

Annette Green's case had a live woman, but no dead man.²¹¹ Perhaps she was convicted, in part, for that reason. Language that requires this gender outcome as the only reality of self-defense, without previously circumscribing the focus to heterosexual battering relationships, makes lesbian defendants less visible and less credible when they claim self-defense. Their chances of conviction may well increase. Though the number of lesbians claiming self-defense in partner killings may be proportionately few, these few cannot be tried fairly in a cultural environment that denies, through its words, the ordeal lesbians experience.²¹²

Changing our language here, like Mahoney's development of the term "separation assault,"²¹³ would represent a legal and cultural intervention that would help make lesbians who kill violent partners in self-defense more comprehensible in law. Law might then adjudicate their cases more justly. Perhaps the change of consciousness induced by changing society's gendered expectations of self-defense cases would redound to the benefit of all battering victims, opening up the rigid gender stereotypes that presently confine those who may credibly assert self-defense. The change would, at a minimum, serve to broaden our awareness of the multiple realities of battering and self-defense.

Mahoney includes lesbians' experiences in her discussion of the multiple realities of battering in other passages of her article.²¹⁴ When describing the relationship between ideology and societal denial of the pervasiveness of battering, she sounds at first as if her scope is limited to heterosexual relationships: "Societal denial amounts to an ideology that protects the institution of marriage by perpetuating the focus on individual violent actors"²¹⁵ Immediately, however, she follows this observation with a discussion of the denial in the lesbian community that for many years impeded recognition of

208 See *id.* at 82-93 (citing *Fennell v. Goolsby*, 630 F. Supp. 451, 454 (E.D. Pa. 1985); *State v. Stewart*, 763 P.2d 572, 574 (Kan. 1988); *State v. Hundley*, 693 P.2d 475, 475 (Kan. 1985); *State v. Osbey*, 710 P.2d 676, 677 (Kan. 1985); *State v. Hodges*, 716 P.2d 563, 564 (Kan. 1986), *overruled by Stewart*, 763 P.2d at 579; *State v. Norman*, 378 S.E.2d 8, 9 (N.C. 1989)).

209 Mahoney, *supra* note 24, at 50. There are no studies of the lethality of same-sex intimate violence. Bricker predicts that because the severity of same-sex intimate violence seems to equal the severity of male-on-female violence, studies will show lethality rates to be proportional as well. See Bricker, *supra* note 6, at 1389 n.41. The important distinction, for purposes of this analysis, is that no one yet knows.

210 Mahoney, *supra* note 24, at 50 n.236.

211 *Green v. State*, 575 So. 2d 796, 796 (Fla. Dist. Ct. App. 1991).

212 See *id.*; *People v. Huber*, 475 N.E.2d 599 (Ill. App. Ct. 1985); *Crawford v. State*, 404 A.2d 244 (Md. 1979). For discussion of some of the difficulties experienced in representing a lesbian claiming self-defense in a partner killing, see Lundy, *supra* note 22.

213 See Mahoney, *supra* note 24, at 71-93.

214 See *id.* at 9, 12, 49-53.

215 *Id.* at 12.

lesbian battering, a denial rooted in protectiveness for the image of lesbian feminist egalitarianism.²¹⁶ Mahoney then describes the differences between these two forms of denial. The first statement denies that heterosexual battering fits into a historical system of gender oppression; the latter seeks to shield a vulnerable community from the loss of its hard-won pride and from increased marginalization and disapproval.²¹⁷

E. Suggestions for Change

I believe that the foregoing passage from *Legal Images of Battered Women* models a structural possibility for a more inclusive discussion of battering that is worth remembering and emulating. Authors and advocates concerned with intimate violence would do well to draw on Mahoney's approach for its content and its form. Mahoney first describes an aspect of a problem that affects heterosexual women.²¹⁸ Although it would have been preferable to circumscribe her description initially, she redeems the situation instantly by juxtaposing her initial observation with a description and analysis of a related problem in the lesbian community.²¹⁹ Mahoney does not insist that the two analyses be precisely the same. Each responds to its own context.

Nor is Mahoney concerned that the effectiveness of the analysis as applied to battered heterosexual women will be undercut by a differently contoured analysis of lesbian battering. The two analyses coexist and together paint a more detailed portrait of the issue of intimate violence. Nothing precludes the development of a description and analysis specific to the problem of gay male battering to stand side-by-side with her observations.

The basic shortcoming of much of the domestic violence literature is not that it describes intimate violence in heterosexual relationships. The shortcoming is that it does so exclusively and without saying so. If the literature described and theorized intimate violence in heterosexual relationships while explicitly stating its focus, far less damage would be done to the visibility and credibility of victims of same-sex intimate violence. Their existence would be acknowledged by awareness of the need to circumscribe explicitly to heterosexual relationships these descriptions of violence. Express acknowledgment of related problems of violence existing in other communities might provide further validation of these communities. Such modest changes in how we think and talk about intimate violence might then, as Schneider urges, allow for change²²⁰ by creating an explicit opening for others to broaden the scope of the examination.

Describing and circumscribing the discussion of intimate violence would be an improvement. One step better, as Mahoney illustrates at times, is describing and including.²²¹ Such a process of inclusion better heeds Schnei-

²¹⁶ *Id.* (denial "was based, in part, on the reluctance to let go of an ideal of lesbian relationships and community . . .").

²¹⁷ *Id.*

²¹⁸ See *supra* note 215 and accompanying text.

²¹⁹ See *supra* note 216 and accompanying text.

²²⁰ See Schneider, *supra* note 24, at 200, 222.

²²¹ See *supra* notes 214-217 and accompanying text.

der's call to feminist theorists and practitioners for describing and changing.²²² In this context, change means not merely noting the categorical limits of one's analyses and acknowledging the experiences of those who fall outside these limits, but also expanding the boundaries of analyses to capture the variety of experiences that constitute the issue at hand.

Schneider fears that "[r]edefinition [of battering] to include other-battering relationships . . . suggests and reinforces an individual psychological, 'anger-management' perspective on battering, instead of an explicitly feminist perspective."²²³ This is a risk but not an inevitability.²²⁴ The recognition of some battering relationships in which power is not allocated in accordance with gender need not undermine feminist analyses of the influence on heterosexual battering of the male dominance/female subordination ideology, as manifested in doctrines such as marital property or family privacy.²²⁵

Gender has always been, and will likely remain for some time, a proxy for power. But it is not the only proxy. Power differentials and desires for control can arise in same-sex relationships for reasons independent of gender. Race, class, age, and physical or mental ability may be implicated along with factors such as personal achievement or family background. Gender ideology remains a crucial determinant of power in violent heterosexual relationships, but other ideologies may rise to greater relative prominence as explanations for battering in lesbian and gay relationships, and perhaps in some heterosexual relationships as well.

It is far too early to postulate a unitary theory of battering in all relationships, or to know if such a theory is possible. Quite possibly, the demands for power and control that constitute the battering process²²⁶ will have different cultural determinants in heterosexual, lesbian, and gay male relationships. The fact that there may be several categories of explanation need not be reduced to a claim that the cause lies in individual pathology. Multiple context-specific theories need not spell the end of any particular context-specific theory, nor must they lead to the demise of group politics.

For these reasons, this Article advocates a way of thinking and talking about intimate violence that recognizes multiple contexts rather than an approach that simply translates the conceptual terminology of battering into a single gender-neutral discourse. Changing "battered women" to "battered people" and "battered woman syndrome" to "battered person syndrome"²²⁷ conveys less about the many realities of battering than would several coexisting explanations articulated in language specific to their expressly circumscribed reference groups.²²⁸

²²² Schneider, *supra* note 24, at 200, 222.

²²³ Schneider, *supra* note 116, at 541-42.

²²⁴ The risk is realized in ISLAND & LETELLIER, *supra* note 32, at 60-62 (labelling batterers as mentally ill people who abuse because they are permitted to get away with it).

²²⁵ See *supra* notes 75-94 and accompanying text.

²²⁶ Most scholars and activists in the field of domestic violence view the batterer's quest for power and control as the central dynamic of battering relationships. See *supra* note 69.

²²⁷ See Bricker, *supra* note 6, at 1430-36 (discussing recommendation for expert testimony that is gender-neutral in that it does not rely on gender-based assumptions).

²²⁸ Of course, this textual statement must be understood in context as well. In some contexts, depending on the audience and the purpose of communication, speaking of intimate vio-

By implication, speaking in one gender-neutral language suggests that we are speaking of one gender-neutral phenomenon. Intimate violence is not gender-neutral. To the contrary, ideas about gender seem to play an important role in intimate violence, but the influence of gender on partner abuse varies—its norms play out differently—when the partnership is heterosexual rather than lesbian or gay.

Our understanding of intimate violence outside of its male-on-female incarnation is too limited to ascertain how much explanatory power for any specific reference groups would be sacrificed by converting to a single inclusive discourse of intimate violence.²²⁹ Given the current stage of knowledge, diluting our language may well distort our understanding. We should not use unduly large, oversimplifying categories if we wish to capture accurately the many variations on the spectrum of intimate violence. For now it is far better to overparticularize by retaining and elaborating several specifically circumscribed parallel discourses.²³⁰ In so doing, the picture of battering, while becoming more complicated, will also become more comprehensive.

III. *The Context of "Representation": The Framingham Eight*

A. *Background*

The Framingham Eight were a diverse lot. Although they petitioned for relief as a group, they were not positioned to obtain relief as a group.²³¹ Certain differences arose from the variety of factual and procedural circumstances of the cases. Some of the petitioners had been convicted after trial; some had pled guilty. Most had inadequate representation at trial; one had a

lence through single inclusive references may pose no great risk of misunderstanding. Other contexts—such as these commutation hearings—warrant a discourse specific to the clearly circumscribed reference group of the client.

²²⁹ See *supra* notes 32-48.

²³⁰ In Mahoney's words: "[W]e need more, not less, explanation." Mahoney, *supra* note 24, at 42.

²³¹ This observation, and most of the observations that follow, are based on my involvement in the Framingham Eight clemency project. Although I could cite authorities for many of these statements—appellate opinions in the underlying cases, petitions for commutation, tapes of commutation hearings, articles written about the cases, conversations with the attorneys who represented each woman—I have chosen not to do so for two reasons. First, I write from direct experience, including representation of one petitioner and attendance at meetings and hearings in which details of the other cases were presented. Second, and more importantly, I do not wish to disclose the identities of the petitioners. When they are identified in the text that follows, it is by first name only.

Each of the cases is a matter of public record, several of the women have made numerous public appearances discussing their experiences, local media coverage has been extensive, and some of the women have spoken on national radio, television, and in an Oscar-winning film. Nonetheless, I believe that it is for the women to choose the various settings in which they will reveal once again the details of their personal relationships with violent partners. Seven of the eight petitioners have been released to the community and are trying to reestablish their lives and identities as something beyond having once killed a batterer and having been convicted and incarcerated for doing so. I wish to respect the difficulties of this endeavor as well as the women's collective desire to let their stories serve an educational function by leaving to them the complexities of the choices about when and where to disclose their identities in conjunction with aspects of their stories. Other authors have struck this balance differently. See Greenwald & Manning, *supra* note 19; Lundy, *supra* note 22; cf. McMorrow, *supra* note 15, at 219 n.6.

sophisticated defense. Through their own testimony or that of witnesses, some were able to present at trial a partial account of their histories of abuse; one had expert testimony. Seven had killed their batterers themselves while in midconfrontation; one had done so through accomplices. The weapons used in the killings included knives, guns, a baseball bat, and a curling iron.

Other differences related to the status and characteristics of the women themselves, their deceased partners, and their webs of attachments. For example, some of the Framingham Eight had considerable civilian opposition to their claims of self-defense, primarily from the families of decedents; others had little or no opposition. Five were African American women; three were Caucasian women. Some had children; others did not. Some appeared strong and brash; others seemed timid and soft-spoken. Seven of the women had killed male batterers (spouses, ex-spouses, boyfriends, ex-boyfriends); one had killed her female lover.

Like all differently situated people, the Framingham Eight also shared certain similarities. None had college degrees or considerable means. Although some had physical scars, all were able-bodied. Each was convicted of and imprisoned for killing an intimate partner after suffering repeated and severe violence. Each claimed that she had survived her abuse only because she had taken her partner's life.

It is possible, even likely, that their shared status as formerly abused, presently incarcerated women who survived by killing the partner they had loved created a bond that powerfully overshadowed most of the differences among the members of the Framingham Eight. These eight women had formed a support group in prison.²³² They had listened to each other, comforted each other, validated each other, informed themselves about domestic violence, and decided to seek commutation of their sentences as a group.²³³ Nevertheless, I wonder whether the connection experienced by the Framingham Eight was magnetizing enough to defuse the power of all the differences that make such a difference in other contexts.

I try to imagine the conversations that may have transpired in the Framingham Eight support group. I try to conjure up the sound of the words, the depth of the feelings, the moments of epiphany, recognition, and catharsis. Then I try to imagine myself in the position of Debra, the group's sole lesbian member, as she listened to stories of women's relationships with men who at some moments were loving, charming, and contrite and at other moments were possessive, controlling, and brutal.²³⁴ Does Debra see herself, hear her situation in these stories? Does she feel fully accepted by the others? Does she fear their homophobia? Is she recognized by the others when she tells her stories of life and death with her lover? Does she feel understood?

²³² The support group was organized by Stacey Kabat of Battered Women Fighting Back!, Inc.

²³³ See Stan Grossfeld, *Love and Terror: "Safer" and in Jail: Women Who Kill Their Batterers*, BOSTON GLOBE, Sept. 2, 1991, at M1.

²³⁴ See WALKER, *supra* note 34, at 73.

Most likely, she feels both included and excluded, visible and invisible, sometimes both in the same instant. The pleasure and the pain that she experienced in her relationship bear marked similarity to the pleasure and the pain expressed by the other women. But all of the women have grown up in a culture that sees heterosexual relations as normal and homosexual relations as tolerable or strange, as not worthy of mention or worthy of repulsion.²³⁵ Some of these perceptions, picked up so easily in our lives, must have surfaced in unguarded moments.

One place that some of these perceptions appear is in the dominant discourse of domestic violence. When they discovered its resonance with their lives, the Framingham Eight, while in prison, taught themselves and learned to speak this language. Undoubtedly, this discourse helped them to know themselves better, to understand their lives more clearly. But in many places, its descriptions and analyses excluded Debra's life. The discourse was not able to illuminate her experiences as fully as those of the others.

Once the clemency project began, this problem was exacerbated. Attorneys and advocates invested considerable effort, both behind the scenes and during the commutation hearings, in educating executive branch decisionmakers via the dominant discourse about the problem of domestic violence.²³⁶ This educational process was vital to responsible decisionmaking and led to the release of some of the women. It was less helpful to Debra, however, because it both clarified and clouded her portrayal.

Attorneys in cases like Debra's often believe that their clients will be rendered most understandable when their intimate relationships are portrayed as having involved a "butch-femme" dynamic.²³⁷ These attorneys feel that the dominant understanding of domestic violence as male-on-female abuse will help gay men and lesbians only if their relationships with their partners are perceived to mimic heterosexual relationships as closely as possible.²³⁸ Heterosexual gender norms, they imply, are the approved cultural

²³⁵ See Herek, *supra* note 36; see also Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979) (discussing negative treatment of gay men and lesbians in the legal system).

²³⁶ For example, Angela Browne testified before the Advisory Board of Pardons about the nature of intimate violence in general. *Commutation Hearing* (July 27, 1992) (on file with author).

²³⁷ This "hetero-relational" paradigm of a lesbian relationship, to which Robson objects, see Robson, *supra* note 37, at 572-86, was adopted by Annette Green's attorneys. See Bricker, *supra* note 6, at 1426 n.203. Bricker quotes from pleadings and briefs in *State v. Green* that indicate Green's partner was "dominant in the relationship" and "strong for a woman," whereas Green "assumed the 'female' role and cared for the children." *Id.* In a motion for a state-funded jury selection expert, counsel stated that partners in "homosexual and lesbian relationships" assume "traditional male-dominant and female submissive roles," and that his client had assumed "the subservient, female, mother role." *Id.*

²³⁸ The power of the hetero-relational paradigm emerges in *Perez v. State*, 491 S.W.2d 672, 673 (Tex. Crim. App. 1973). A female defendant accused of killing another woman testified that she was not a lesbian. *Id.* at 675. To refute this contention, the prosecution presented testimony and admitted photographs showing that the defendant "dressed like a man; kept her hair cut like a man; wore men's clothing, including men's shoes; and . . . 'always takes a man's place.'" *Id.*; see Bricker, *supra* note 6, at 1426 n.203; Robson, *supra* note 37, at 572-73. The power of the hetero-relational paradigm is also evident, to some extent, in Littleton, *supra* note 165, at 28

measure of all relationships. Debra's attorneys did not adopt this method, as the butch-femme dynamic did not approximate a fully accurate rendering of Debra's relationship with her partner.²³⁹ Debra's petition for commutation was not granted. The decisionmaker's education in the dominant literature of domestic violence benefitted all the petitioners except Debra, whom it both benefitted and blocked.

B. *The Dual Meaning of Representation*

When representing any client in any sort of case, an attorney faces many obstacles to fairly "re-presenting" the client and his or her life in a legal forum.²⁴⁰ Unconfronted and unbridgeable differences between attorney and client can create one barrier to adequate representation when the attorney inhibits, fails to elicit, or cannot appreciate certain details that might better capture the client's experiences.²⁴¹ The sheer volume and complexity of the relevant factual, social, and psychological data that must be selectively incorporated into the representation of clients pose other logistical barriers.²⁴² The limitations—personal, psychological, structural, and otherwise—on a client's capacity and desire to identify, remember, and relate the most illustrative details of his or her life will also interfere with representation.²⁴³ The constraints of the forum²⁴⁴ and the stereotypes held by decisionmakers²⁴⁵ also create dilemmas for attorneys in choosing a strategy of representation.

In representing the Framingham Eight, attorneys also made representations of intimate violence. Educating the decisionmakers about intimate vio-

n.20. Catherine MacKinnon has also adopted the paradigm. See MACKINNON, *supra* note 137, at 72. Robson indicates that "[t]o sanction MacKinnon's view would be to make relevant an inquiry into 'who is the man' in order to determine the identity of the batterer." Robson, *supra* note 37, at 586.

239 Nor will this butch-femme dynamic typically provide an accurate rendering of a gay or lesbian relationship. See Herek, *supra* note 36, at 163 (indicating that task specialization in gay and lesbian relationships is based on individual skills and preferences not husband/wife roles in which each partner assumes either the "masculine" or the "feminine" tasks).

240 See Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459, 2460-61 (1989).

241 See, e.g., Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1675-82 (1991). For an astute exploration of the inherent difficulties of client representation in the context of capital cases, see James M. Doyle, *The Lawyer's Art: "Representation" in Capital Cases* (unpublished manuscript on file with author).

242 See McMorrow, *supra* note 15, at 225 ("There are so many things to explain and the explanations lie in subjects difficult to capture with language."). This is particularly true in cases of intimate violence where the nature of a changing relationship over a period of many years and thousands of interactions may be relevant.

243 Defendants often have only partial recollections of the killing of their batterers. See, e.g., WALKER, *supra* note 46, at 40 (explaining that many battered women who kill their batterers are in psychological states that lead to memory repression about the killings).

244 The rules of evidence, and a narrow understanding of "relevance," are obvious constraints.

245 On the inevitability of stereotyping, see Minow, *supra* note 30. On the need for lawyers to consider with their clients the impact of stereotypes held by decisionmakers, see Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992).

lence was essential to combat cultural stereotypes about women who stay in intimate relationships that dissolve into violence.²⁴⁶ Nonetheless, using the dominant domestic violence discourse to educate decisionmakers did not eradicate stereotypes of intimate violence; it merely ameliorated them to some degree. The education process may have helped persuade decisionmakers that an abused woman who stays, for some period of time, in a battering relationship is neither masochistic nor responsible for her husband's or boyfriend's violence.²⁴⁷ Given the norms of the dominant understandings of intimate violence, however, the education process was also likely to persuade decisionmakers that the abuse victim is a woman, perhaps a particular sort of woman and that her violent partner is a man who overreaches his male prerogatives. Attorneys must choose portrayals of clients against the backdrop of these default characteristics.

The difficulties that we faced in re-presenting our client, Elaine, were manifold. The primary difficulty was that, despite considerable evidence to the contrary, the family of her late husband portrayed him as thoroughly gentle and nonviolent. Accordingly, they painted Elaine as manipulative and pathological. The problems generated by this backdrop were further exacerbated by the fact that Elaine had fought back in the past, that she had abused prescription drugs as a form of self-medication, that she had made several misstatements to the police after her husband's death, and that she did not have the docile disposition of the perfect female victim.

On the other hand, some features of Elaine's case worked to her advantage. She had retained paper copies of three of the many restraining orders that she had obtained against her husband over the years. Numerous family and friends had witnessed her husband's violence against her and were willing to recount their observations in letters, affidavits, or oral testimony. One friend had Polaroid pictures of Elaine's many large violet bruises after one of her husband's beatings. During a period of legal separation, Elaine had filed a complaint for separate support for cruel and abusive treatment, and her husband had signed this document, indicating his agreement with the allegations it contained. Perhaps as importantly, at the time of the incident that took his life, Elaine's husband stood six feet-four inches tall and weighed 380 pounds, whereas she stood five feet-two inches tall and weighed 120 pounds.

Our strategic response to this mixed picture was to try to highlight the details that fit the good battered woman stereotype, emphasizing the size difference between Elaine and her husband as well as the extraordinary degree to which she could corroborate her testimony of abuse.²⁴⁸ We minimized the features of her case that did not fit the stereotype, describing many of them

²⁴⁶ See, e.g., Schneider, *supra* note 24, at 207.

²⁴⁷ *Id.*

²⁴⁸ More commonly, a victim of intimate violence cannot corroborate the abuse. See RICHARD GELLES, *THE VIOLENT HOME* 107 (1987) (domestic violence is generally a crime with no witnesses); Greenwald & Manning, *supra* note 19, at 15 ("[I]n domestic violence cases, very few women will be able to produce eyewitnesses or such documentary evidence as medical reports, police reports or restraining orders to prove their case. Battering usually takes place behind closed doors, and for a slew of reasons, including fear of retaliation, poverty, ignorance and shame, battered women do not seek help from others.").

as false (nonviolent husband), irrelevant (client's personality/disposition), or indicative of the consequences of abuse (misstatements, self-medication).²⁴⁹ More precisely, by characterizing some of the perceived problems with the case as documented examples of the consequences of abuse—typically denominated as battered woman syndrome—we reinterpreted potential cracks in the case as corroborative of our claim.

We did not, however, challenge directly the underlying stereotype of the worthy battered woman. We simply sought to portray Elaine as falling within it. In her case, this seemed to be the best strategy of "representation," the one most likely to prevail. After a grueling two-day hearing, it did prevail in the short run. Elaine received a 5-1 recommendation for commutation of her sentence from the Advisory Board of Pardons and Parole. Nevertheless, in light of the passionate opposition from the decedent's family, Governor Weld refused to act on this recommendation. Instead, Elaine was released on parole at her first eligibility date.

The dominant discourse of battering assisted Elaine by providing a vehicle for reinterpreting the presumed weaknesses of her case as strengths. This gender-specific discourse made Elaine's behavior easier to understand. Unfortunately, the discourse was not deemed sufficiently applicable to Elaine's case to make her actions seem reasonable, and therefore justifiable, when she took her batterer's life while saving her own.

In representing Elaine, we chose to re-present her as fitting within the boundaries of the good battered woman stereotype.²⁵⁰ Given the narrowness of the stereotype, this posed some difficulties, required some effort, and ultimately failed to generate relief. But the fact that this was a viable option was a sign of privilege that we failed to recognize. Use of this option depended on the maleness of the batterer and the femaleness of the battered. In this fundamental aspect, Elaine fit the norm. Debra's attorneys, on the other hand, had no choice but to challenge this norm, to expose and to question the heterosexual imagery of the stereotypes, and to argue that a lesbian relationship could involve battering that required the abused woman to act violently in self-defense.

By unconsciously reinforcing the heterosexual imagery of domestic violence, we diminished even further Debra's chances of obtaining relief, because her claim relied on undoing this imagery. Was this an inevitability? Did effective representation of Elaine require us to reinforce the heterosexual imagery of the domestic violence discourse? Had we been more mindful of this issue, might we have reduced the harmful impact of our representation on Debra's case? In responding to these questions, it is useful to begin by looking to the legal profession's ethical guidelines.

²⁴⁹ See BROWNE, *supra* note 42, at 157-60.

²⁵⁰ See *supra* notes 133-136 and accompanying text.

C. Professional Norms

It hardly bears repeating that an attorney owes a duty of partisan loyalty to a client above all others.²⁵¹ This duty is embodied in a number of rules. The *Model Code of Professional Responsibility* instructs lawyers to pursue their clients' lawful aims regardless of the incidental harms caused to third parties.²⁵² The proposed 1983 *Model Rules of Professional Conduct* evince greater concern for the impact of a client's representation on third parties, although the client's interests do, of course, remain paramount.²⁵³

The *Massachusetts Canons of Ethics and Disciplinary Rules* contain a provision that seeks to limit the kind of harm that an attorney may inflict on a third party in the course of representing a client. DR Rule 7-106(C)(8) indicates that in representing a client it is "professional misconduct" to manifest "bias or prejudice" based upon a number of factors, including "sexual orientation," but it does permit "legitimate advocacy" with respect to these factors.²⁵⁴ Though laudable in purpose, this rule is practically limited by the generality of its language and its failure to illuminate the intended distinction between legitimate advocacy and illegitimate exploitation of bias.

Using the dominant discourse of domestic violence is unquestionably legitimate advocacy for a commutation proceeding in a case of battered woman's self-defense. Yet embedded in this advocacy is a bias tied to sexual orientation, since the parlance typically encompasses only heterosexual relationships and therefore erroneously implies that intimate violence is confined to these relationships. This bias harms third parties such as Debra, rendering her claim less cognizable in a legal forum. The rule contemplates neither the subtlety and pervasiveness of bias, nor the possibility that legitimate advocacy can manifest bias. Therefore, it provides negligible assistance in responding to the questions at hand.

²⁵¹ See, e.g., Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 3 (1951) ("The lawyer's official duty . . . is to devote himself to the client.").

²⁵² MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1981) [hereinafter MODEL CODE] (lawyer must "represent his client zealously within the bounds of the law"); MODEL CODE EC 7-10 (lawyer's duty to represent client zealously "does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm"); MODEL CODE DR 7-101(A)(1) (lawyer must not intentionally "fail to seek the lawful objectives of his client through reasonably available means").

²⁵³ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1983) [hereinafter MODEL RULES] ("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the . . . concern for third persons who might be adversely affected."); MODEL RULES Rule 4.4 cmt. (third party interests are subordinate to those of the client). At least some portions of the *Model Rules* govern lawyers in 36 states. The rest of the states use the *Model Code* or their own version of it. See Stephen Gillers & Roy D. Simon, REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (3d ed. 1992).

²⁵⁴ MASSACHUSETTS CANONS OF ETHICS AND DISCIPLINARY RULES DR 7-106(c)(8) (1972) and MODEL CODE DR 7-106(c)(8) (as amended June 8, 1992). A similar rule has been proposed by the ABA as an amendment to Model Rule 8.4. See ABA House of Delegates, Reports with Recommendations to the House of Delegates, Nos. 101 & 104 (1994). Other states have comparable provisions. See COLORADO RULES OF PROFESSIONAL RESPONSIBILITY DR 1.2(f) (1984); NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1984).

One recommendation that may offer some assistance appears in Model Code EC 7-8. This provision underlines the desirability of lawyers discussing with their clients both the moral and legal factors that may affect strategic choices in the conduct of a case. The provision indicates that "the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client . . ."²⁵⁵ Commentators have urged lawyers to reveal to their clients the moral qualms that they feel about any particular strategies of representation, to seek their clients' guidance, and to allow clients to participate in decisions about these strategies.²⁵⁶

The conclusion that I draw from an examination of these guidelines is this: The legal profession provides some general help in resolving the particular dilemmas raised by our representation of Elaine in the context of the Framingham Eight commutation project, but this help is quite limited. The next section attempts to apply this explicit normative backdrop to a reconsideration of Elaine's representation. Of necessity, however, much of the grist for this reconsideration comes from other sources.

D. Revisiting the Representation

In retrospect, had we fully identified the bias reflected in our representation of Elaine prior to the filing of her commutation petition or the hearing on her petition, a professional obligation would have arisen to discuss the issue with Elaine. The particularities of the unusual representational context of the commutation project contribute to my sense of obligation in this situation. The impetus for the inception of the commutation project was the decision by eight female prisoners, who perceived themselves as a group, to make common cause. The route to common cause was the simultaneous filing of individual petitions for sentence relief.²⁵⁷ Despite the distinct nature of the representations that would follow, the choice to pursue this remedy together was the outgrowth of a self-conscious political decisionmaking process in which all members of the group participated and expressed assent.

This scenario sharpens the need to consider the impact of Elaine's representation on at least those third parties with whom she chose to link her fate, since group solidarity had preexisted the individual commutation cases. The members of the group had chosen political solidarity despite their awareness that in some senses their interests were legally adverse. They suspected that decisionmakers would not view the eight cases as equally meritorious, that the stronger cases might be used to undercut the weaker cases, and that a group-based strategy would not realistically lead to a group-based remedy.

The eight women nonetheless felt that they would garner more sympathetic public attention as the Framingham Eight than as eight similarly situated, individual petitioners. They also saw themselves as compatriots in a

²⁵⁵ MODEL CODE EC 7-8 (emphasizing client's full consideration of all relevant factors before making final decision, which is "ultimately for the client" and not for the attorney).

²⁵⁶ See Peter Margulies, "Who Are You to Tell Me That?": *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213, 221 (1990); Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 664 (1986).

²⁵⁷ Greenwald & Manning, *supra* note 19, at 3.

campaign, even if the governor saw them as rivals for relief. In this context, an attorney might well predict that the client would feel concerned about the effect of her representation on others' representations. Nonlegal factors would seem to loom large. In such a context, an attorney who identified the potentially harmful consequences on another petitioner of the dominant discourse of domestic violence would have a corresponding professional duty to discuss this issue with the client, to advise the client about representational options, and to permit the client to choose from among them.

Under these circumstances, what were Elaine's representational options? In a sense, the pertinent options were to represent Elaine through use of the dominant discourse of domestic violence or to construct a parlance that did not imply that intimate violence was solely perpetrated by violent men. The latter option is not as daunting as it first appears. For example, we might simply have adopted the suggestions delineated in the previous section,²⁵⁸ taking care to circumscribe explicitly to heterosexual relationships when discussing a situation, such as Elaine's, of male on female violence. Beyond the acknowledgment implicit in the choice to circumscribe, we might have explicitly acknowledged the problem of violence in lesbian relationships. In other words, our language can admit the possibility that not all batterers are men. Had we consciously used such language during the commutation project, this express acknowledgment would have set the stage for Debra's attorney to explore more fully the nature of intimate violence in a lesbian relationship.

In a representational setting where concepts of legal relevance have some applicability, the exploration of violence in lesbian relationships is best saved for the case involving such a relationship. This recognition does not diminish the need to circumscribe descriptions of heterosexual intimate violence in other cases or to acknowledge, through choice of words, the possibility of intimate violence in lesbian relationships. These representational choices would have legitimated the claims of violence and self-defense in a lesbian relationship when such claims were raised in a subsequent case. The claims may have become less startling and more plausible to decisionmakers.²⁵⁹ The educational process inherent in the representation of the lesbian petitioner would then prove merely supplementary, not contradictory, to the educational process inherent in the other cases.

Acute attention to the representations of intimate violence in the Framingham Eight cases might have broadened and deepened our cultural understanding of intimate violence by including an awareness of its existence

²⁵⁸ See *supra* note 220 and accompanying text.

²⁵⁹ Determinations of plausibility are culturally malleable and can be influenced by receiving information about others' realities. See, e.g., W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* 171 (1981) ("[T]hose who come from different social worlds may disagree about the meaning and plausibility of the same stories."); Goldfarb, *supra* note 241, at 1679 ("Relevance and plausibility are contingent characteristics, dependent on one's world view."); Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 *CARDOZO L. REV.* 37, 47 (1988) ("[Judgments of plausibility] emerge from intuitions that may express both shared understandings in the community and understandings contested by other members of the community.").

in both heterosexual and lesbian relationships. Undertaking an educational process about intimate violence in gay male relationships as well would have been difficult in the Framingham Eight project, because none of the cases raised this issue. Nonetheless, by circumscribing the stories of violence to the particular kinds of relationships involved, the language chosen to represent intimate violence would not have excluded the possibility of violence in a relationship between gay men. Moreover, scholars of intimate violence, not constrained by the needs of representing clients, can choose words inclusively so as to admit the existence of intimate violence between gay men.

The Framingham Eight cases actually provide an easy setting for urging attorneys to consider, along with their clients, the impact of representational choices on nonclients, because greater inclusiveness might have been achieved without trading off much client advantage.²⁶⁰ The heterosexual client would still be fully described by the more inclusive and more precise language, but the attorney would not have purchased an accurate description of one client through the exclusion of others.

A less sanguine perspective suggests, however, that heterosexual gender imagery is so embedded in the current understanding of intimate violence that more inclusive discussions of the problem would have been relatively ineffectual in dislodging this imagery. Tenacious stereotypes are resistant to even the most concerted efforts to undo them.²⁶¹ Regardless of this likelihood, however, a moral principle of avoiding gratuitous harm to others would dictate that attorneys refrain from reinforcing gender stereotypes in intimate violence cases when richer and truer descriptions of the problem are readily advanced.

Conclusion

Many men are batterers and many women their victims. This is one manifestation of a system of gender subordination; intimate violence takes other forms as well. The relationships of lesbians and gay men are not immune to issues of power and control, or to the violence that can erupt as a result. The conversation about intimate violence must attend to its various contexts if both recent advances and future progress on behalf of battered heterosexual women are to be extended to all battering victims. Rather than deepening the plight of "non-traditional" victims of intimate violence, we should deepen our understanding of the source and scope of the problem of violence between intimates. Our language—the way in which we talk and think about intimate violence—mirrors and remakes the depth of our understanding.

The existence of intimate violence in gay and lesbian relationships does challenge the dominant theoretical accounts of intimate violence that femi-

²⁶⁰ For thoughtful discussion of the important competing interests that are often at stake in the consideration of the effect of representational choices on third parties, see Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1 (1994); Margulies, *supra* note 256.

²⁶¹ See SANDER L. GILMAN, *DIFFERENCE IN PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS* 15-35 (1985); Nilsen, *supra* note 260, at 38.

nists have offered. It is important to appreciate, however, that it need not challenge their viability-in-context, just their generalizability beyond their unacknowledged boundaries. We must not abandon the theories and strategies that have been helpful to battered heterosexual women. Yet we ought to circumscribe these approaches in all instances and, where possible, supplement them with theories and strategies responsive to the lives of battered lesbians and gay men. Supplementing in this fashion extends the horizon of our knowledge. It is, therefore, a form of strengthening.

My involvement in the Framingham Eight commutation project brought this issue into my view, but unfortunately it was only in posthearing reflections that these insights fully dawned. This Article serves as an acknowledgment of the harm that we can sometimes do while seeking to undo harm. It is dedicated to Debra, in apology and gratitude, and in the hope that it will help improve our cultural capacities to see violence in all of the places that it exists and to stop it.

